(12)

No. 94-367-CFX
Status: GRANTED

Title: George W. Heintz, et al., Petitioners
v.
Darlene Jenkins

Docketed:
August 25, 1994

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Griffith,D. Kendall, Newburger,Manuel H.

Counsel for respondent: Edelman,Daniel A., Faulkner,Joanne

Ptn due & mld 8-25-94, see ml label re dkt dt.

Entry	Date	Note	Proceedings and Orders
1	Aug 25 1994	G	Petition for writ of certiorari filed.
2	Sep 28 1994		DISTRIBUTED. October 14, 1994 (Page 26)
3	Oct 6 1994	X	Brief of respondent Darlene Jenkins in opposition filed.
5	Oct 24 1994		REDISTRIBUTED. October 28, 1994
6	Oct 31 1994		Petition GRANTED.
			**
7	Dec 15 1994		Brief of petitioners George Heintz, et al. filed.
9	Dec 15 1994		Brief amicus curiae of American Bar Association filed.
10	Dec 15 1994		Brief amicus curiae of National Association of Retail Collection Attorneys filed.
11	Dec 15 1994		Joint appendix filed.
13	Dec 15 1994		Brief amicus curiae of Commercial Law League of America filed.
12	Dec 21 1994		SET FOR ARGUMENT TUESDAY, FEBRUARY 21, 1995. (2ND CASE)
14	Dec 23 1994		CIRCULATED.
15	Dec 30 1994	D	Motion of Commercial Law League of America for leave to participate in oral argument as amicus curiae filed.
16	Jan 5 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Seventh Circuit.
18	Jan 12 1995	X	Brief amicus curiae of Sherry Ann Edwards filed.
17	Jan 17 1995		Motion of Commercial Law League of America for leave to participate in oral argument as amicus curiae DENIED.
19	Jan 17 1995	X	Brief of respondent Darlene Jenkins filed.
20	Jan 17 1995	X	Brief of National Consumer Law Center, et al. filed.
21	Feb 6 1995		Record filed.
		*	Original record proceedings United States District Court for the Northern District of Illinois.
22	Feb 14 1995	X	Reply brief of petitioners filed.
23	Feb 21 1995		ARGUED.

1 pp

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI OF GEORGE W. HEINTZ AND BOWMAN, HEINTZ, BOSCIA & McPHEE

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
Attorneys for Petitioners

HINSHAW & CULBERTSON
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

46 pp

QUESTION PRESENTED FOR REVIEW

Is an attorney engaged solely to prosecute litigation against a consumer a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6))?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER SOURCES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,
Petitioners,

v.

DARLENE JENKINS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI OF GEORGE W. HEINTZ AND BOWMAN, HEINTZ, BOSCIA & McPHEE

PREVIOUS OPINION

The decision of the Court of Appeals in *Jenkins v. Heintz, et al.*, is officially reported at 25 F.3d 536 (7th Cir. 1994). The decision of the district court was not officially reported.

STATEMENT OF JURISDICTION

The Court of Appeals filed its decision in this case on May 27, 1994. No petition for rehearing was filed.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1692a(6) (original and as amended); 15 U.S.C. § 1692e; 15 U.S.C. § 1692f; 15 U.S.C. § 1692i (statutory texts reprinted in full in the Appendix).

STATEMENT OF THE CASE

Facts

All of the foregoing facts are set forth in respondent's amended complaint, reprinted in full in the Appendix (App. 15-23).

Respondent, Darlene Jenkins ("Jenkins"), defaulted on a car loan she had taken out with Gainer Bank ("the bank"). The installment loan agreement required that Jenkins maintain insurance on the car. In the event Jenkins did not maintain insurance, the bank was authorized to do so and, at its sole option, add the expense of maintaining insurance to the loan balance.

When Jenkins defaulted on the car loan, she also stopped buying insurance. The bank purchased insurance and hired petitioner, George Heintz, and the law firm of Bowman, Heintz, Boscia & McPhee (collectively "Heintz") to recover the unpaid balance on the loan, including insurance payments made by the bank.

Heintz filed suit on behalf of the bank for the unpaid balance on the installment agreement. After filing suit, Heintz wrote a letter to Jenkins' attorney explaining the bank's theory of the case and proposing that the case be settled (the full text of this letter is reprinted in the Appendix).

Jenkins did not believe the bank was entitled to $4,173 for insurance. She contended that the insurance charge

was a financial protection policy against default, rather than insurance against damage or loss to the car.

Proceedings in the Lower Courts

Jenkins sued Heintz under the Fair Debt Collection Practices Act. *See, generally*, 15 U.S.C. § 1692. She alleges that Heintz violated 15 U.S.C. § 1692f, which prohibits debt collectors from adding unauthorized charges to a debt. She further alleges that Heintz' efforts to collect the allegedly false insurance charge was the use of a "false representation or deceptive means" of collecting a debt under 15 U.S.C. § 1692e.

Heintz filed a motion to dismiss the complaint under F.R.C.P. 12(b)(6). Heintz argued that an attorney engaged solely to prosecute litigation on behalf of a client/creditor was not a "debt collector" within the meaning of the Act. Heintz supported his motion with extensive references to the legislative history and administrative interpretation supporting this construction of the Act. The district court granted the motion and dismissed the case with prejudice (App. 9-15).

The Court of Appeals reversed (App. 1-8). Relying upon the allegations in Jenkins' complaint that Heintz "regularly engaged for profit in the collection of debts," the court found that Heintz was a debt collector within the meaning of 15 U.S.C. § 1692a(6). The court rejected the argument that Congress did not intend the Act to apply to attorneys engaged solely in the prosecution of litigation, finding that the broad statutory language "entered all areas inhabited by 'debt collectors' even litigation" (25 F.3d at 539). The court declined to address the legislative history and administrative interpretation of the Act; "our analysis ends with the [statutory] language. *Id.* at 539.

ARGUMENT

I.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE COURTS OF APPEALS CONCERNING THE APPLICABILITY OF THE ACT TO ATTORNEYS ENGAGED SOLELY IN THE PROSECUTION OF LITIGATION.

The Seventh Circuit sided with the Fourth Circuit's decision in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992), in holding that an attorney engaged to pursue litigation against a defaulting consumer may be liable under the Fair Debt Collection Practices Act. Not cited in the opinion were the more recent decision in *Fox v. Citicorp Credit Services*, 15 F.3d 1507 (9th Cir. 1994), as well as the subsequently-issued decision in *Paulemon v. Tobin*, ____ F.3d ____ (2nd Cir. 1994, Dk. No. 94-7153; dec'd 7/13/94). These cases agree with the decisions in both *Scott* and the instant case.

However, in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), the Sixth Circuit came to precisely the opposite conclusion. The court held that the Act, viewed in context, "was not intended to govern attorneys engaged solely in the practice of law." 9 F.3d at 21.

The holding in *Green* echoes the holding of the district court in this case, as well as decisions from other district court judges. *Fireman's Insurance Company of Newark, New Jersey v. Keating*, 753 F.Supp. 1137 (S.D. N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F.Supp. 1139 (S.D. N.Y. 1990). As will be seen in the foregoing sections, these opinions, and not those of the other courts of appeals, effectuate congressional intent. This Court should grant certiorari to resolve this split among the circuits.

II.

THE FAIR DEBT COLLECTION PRACTICES ACT DOES NOT APPLY TO ATTORNEYS ENGAGED SOLELY TO REPRESENT THEIR CLIENTS IN CONSUMER DEBT LITIGATION.

The primary flaw in the Seventh Circuit opinion is that it finds "plain meaning" in a phrase which is not nearly so plain. The term "debt collector" is reflexively defined in 15 U.S.C. § 1692a(6), *i.e.*, as someone who regularly engages in the collection of debts. That begs the question posed by this case: what is the "collection of a debt?"

Like many ambiguous terms, there is a core of persons or objects to which the term clearly applies. Collection agencies, credit bureaus and the like, who are hired by creditors to contact debtors to pressure them into paying their debts, plainly are engaged in the collection of debts within the meaning of the Act. But the activities of an attorney, whose only contact with the debtor may be through pleadings or correspondence with the debtor's counsel, do not neatly fit within the common, everyday use of the phrase "collection of a debt."

When a statute is ambiguous, the courts turn to the legislative history of the statute to divine congressional intent. *Burlington Northern R.R. Co. v. Oklahoma Tax Commission*, 481 U.S. 454 (1987). Furthermore, if the legislative history is clearly contrary to the language of the statute, it may overcome the congressional language, although such circumstances are exceptional. *Id.* at 461.

In the instant case, the intent of Congress with respect to attorneys practicing law is clear and uncontested. In the original version of the statute, attorneys were specifically exempted from the definition of "debt collector." (App. 25-26). In 1986, Congress deleted the attorney exemp-

tion from the Act. In so doing, Congress cited the abuse by attorneys of their exemption, allowing them to engage in the unsavory collection tactics (late night phone calls, telephone calls at work, harassing and threatening letters) forbidden to non-attorney collectors. H.R. Rep. No. 405, reprinted in 1986 *U.S. Code, Congress and Administrative News* 1757, 1754-55.

The record of what Congress meant by the elimination of the attorney exemption as it pertains to this particular case strongly favors the inapplicability of the Act to attorneys in Heintz' position. Representative Frank Annunzio, who sponsored the legislation repealing the attorney exemption, addressed the House of Representatives three months subsequent to the passage of the amendatory Act. Representative Annunzio stated:

> Ethical attorneys need have no concerns about the impact of the Act on their practices. The [Act] regulates debt collection, *not the practice of law.* Congress repealed the attorney exemption to the Act not because of attorneys' conduct in the courtroom, but because of their conduct in the back room. Only collection activities, *not legal activities are covered by the Act.* (Emphasis added). 132 Cong. Rec. page 10,031 (1986).

Representative Annunzio further stated:

> "[R]epeal of the exemption does not infringe upon the practice of law by attorneys, it does assure that consumers are protected from the unfair and unethical practices, regardless of the *profession* of the collector." (Emphasis added). *Id.*

Representative Annunzio's point is unmistakable. The ordinary practice of law, which necessarily includes the filing of pleadings and communications with opposing counsel, does not make one a debt collector. Debt collectors

use "backroom" tactics; there is no allegation that Heintz did any of this while providing legal representation to the bank.

Additionally, this Court will accept an administrative agency's construction of an ambiguous statute if it is based upon a permissible construction. *Mead Corporation v. Tilley,* 490 U.S. 714, 722 (1989). The agency charged with administering the Fair Debt Collection Practices Act is the Federal Trade Commission. Its position was stated in its 1988 staff commentary of the Act:

> An attorney or law firm whose efforts to collect consumer debts on behalf of its clients regularly include activities traditionally associated with debt collection, such as sending demand letters, dunning notices or making collection calls to consumer, is included in the Act's definition of "debt collector." *Statement of General Policy or Interpretation Staff Commentary Fair Debt Collection Practices Act,* 53 Fed. Reg. 50, 097, 50, 102 (1985). On the other hand, "an attorney whose practice is limited to legal activities, e.g., the filing and prosecution of lawsuits to reduce debts to judgment)" does not fall within the definition. *Id.*

The original attorney exemption was not conduct-based. Attorneys were not exempt from liability based upon the particular tactics which they employed against the debtor; they were exempt from *all* liability under the Act. Thus, the removal of the exemption merely brought to the forefront the question posed in this case. This question could never have arisen under the original statutory language, when attorneys were exempt from all liability by virtue of their status.

Contrary to the holdings of *Fox* and *Paulemon,* this interpretation of the Act is not a "phantom limb" theory

of statutory interpretation, whereby the blanket attorney exemption remains in effect despite the repeal of the exemption. *Fox*, 15 F.3d at 1512. Heintz is not asking for an exemption for liability when he acts as *a debt collector*. Heintz contends that the filing of a complaint in court on behalf of a client and following up the complaint with a letter to opposing counsel are not the actions of a "debt collector" as that term is commonly understood.

In fact, liability for attorneys in this situation is the result of phantomlike amendment. In 1978, Congress did not have to consider whether its definition of "debt collector" included attorneys engaged in the actual practice of law. That is because attorneys were exempt from *any* liability under the Act. When the Act was amended to remove this exemption, the issue in this case, not relevant beforehand, emerged. That is why Representative Annunzio had to explain what the repeal of the attorney amendment was intended to accomplish.

Because the core of the phrase "debt collector" does not clearly include attorneys representing their clients in litigation, the Act is ambiguous. This Court should accept review and follow the legislative history to achieve the result Congress intended when deleting the attorney exemption—to prevent application to those engaged solely in the practice of law.

CONCLUSION

For the reasons stated, petitioners George Heintz, and Bowman, Heintz, Boscia & McPhee respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
Attorneys for Petitioners

HINSHAW & CULBERTSON
Of Counsel

Dated: August 25, 1994

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2861

DARLENE JENKINS,

Plaintiff-Appellant,

v.

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1332—**George M. Marovich,** *Judge.*

ARGUED JANUARY 4, 1994—DECIDED MAY 27, 1994

Before FAIRCHILD, MANION, and KANNE, *Circuit Judges.*

MANION, *Circuit Judge.* Darlene Jenkins sued George W. Heintz and his law firm, Bowman, Heintz, Boscia & McPhee, for violating the Fair Debt Collection Practices Act, 15 U.S.C. §1601 *et seq.* Heintz and the law firm filed a motion to dismiss, arguing that attorneys who file suit to collect debts are not covered by the Act. The district court agreed and dismissed the lawsuit. Jenkins appeals. We reverse and remand.

I. Facts

Darlene Jenkins borrowed money from Gainer Bank to purchase a car. The installment contract between the bank and Jenkins required that she keep insurance on the car until she made her last payment. If she did not keep insurance, the installment contract allowed the bank to purchase insurance for the car, and then to charge Jenkins for the cost of the insurance. Specifically, the installment contract provided:

> if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins defaulted on her loan. She also stopped buying insurance for the car. The bank then purchased insurance, and hired an attorney, George W. Heintz, and his law firm, Bowman, Heintz, Boscia & McPhee, to recover the remaining installment payments and the cost of the insurance. The attorneys sued Jenkins on behalf of the bank, demanding the installment payments and a $4173.00 insurance charge, and then attempted to settle the matter out of court.

Jenkins took issue with the $4173.00 insurance demand. She had reason to believe that the bank did not buy simple damage and loss insurance for the car, but instead purchased a financial protection policy to insure against the possibility that she might default on the loan. She figured that she had no obligation to reimburse the bank for that type of insurance; she was only required to reimburse the bank if it purchased damage and loss insurance for the car.

Jenkins filed suit against Heintz and his law firm, alleging that their attempts to pass the unauthorized insurance costs on to her violated the Fair Debt Collection Practices

Act. Her legal theory was two-fold. First, she claimed that because the insurance charge was not authorized by the installment contract, that the attorneys violated §1692f of the Act, by adding an unauthorized amount onto the debt. Second, she claimed that the attorneys' attempt to sneak the insurance charge onto her bill amounted to a "false representation or deceptive means to collect any debt" in violation of §1692e of the Act.

Heintz and his law firm moved to dismiss. They asserted that Congress simply could not have intended to regulate normal legal proceedings under the auspices of the Act. The district court agreed, and dismissed the case. Jenkins appeals. We must determine whether the broad purview of the Act covers the type of attorney conduct described in Jenkins' complaint.

II. Analysis

We review the district court's dismissal for failure to state a claim *de novo*. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992). In conducting our review, we accept all material allegations made in the complaint as true, and we draw all reasonable inferences from the allegations in the plaintiff's favor. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992). We will affirm the court's dismissal if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Congress enacted the Fair Debt Collection Practices Act in 1977, "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e). The Act targeted common abusive debt collection practices, like late-night phone calls, §1692c(a)(1), embarrassing communications through third parties, §1692c(b), harassment, §1692d, false and mis-

leading representations by the debt collector, §1692e, and assorted other practices, §§1692f-j. Obviously, Congress did not intend to eliminate all debt collection practices, only those which it considered unfair. In its original form at least, the Act stopped short of regulating certain methods of debt collection. For instance, legal proceedings did not fall under the purview of the Act. Congress accomplished this by explicitly exempting from the definition of "debt collector," "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." §1692a(6)(F).

The attorney exemption meant that attorneys could go about the legitimate business of debt collection without the fear of being sued. But it also made attorneys an unregulated class of debt collectors. Some apparently abused this loophole and engaged in abusive debt collection practices with impunity. As the Sixth Circuit recently noted, "[a]ttorneys were advertising to creditors that they could do with impunity what other collectors could no longer do: 'late-night telephone calls to consumers, calls to consumers' employers concerning the consumer's debts,' and 'disclosure of consumer's debt to third parties.'" *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993). In 1986, Congress acted to close this loophole; it amended the Act to remove the attorney exemption.

This case presents the question whether, in the wake of the 1986 amendment, attorneys acting in the course of litigation are now included within the scope of the Act. The district court determined that even in its revised form, the Act was simply not meant to regulate attorneys acting in the course of litigation. Our *de novo* review of the district court's interpretation of the statute's meaning requires that we look first to the statute's language. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). When the statute's language is clear, the text controls. *Estate of Cowant v. Nicklos Drilling Co.*, ___ U.S. ___, 112 S.Ct. 2589, 2594 (1992).

The Act regulates the conduct of any "debt collector." §1692a(6). The Act defines "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another." §1692a(6). Nothing in this definition hints that attorneys in the course of litigation should be excluded. Therefore, if a plaintiff can demonstrate that an attorney fits within the rubrics of the statutory definition of "debt collector," then that attorney's conduct is regulated.

Here, Jenkins alleged in her complaint that Heintz and his law firm were "regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a 'debt collector' as defined by the [Act §1692a(6)]." The proceedings have not advanced beyond the motion to dismiss stage. Therefore, we are required to accept this allegation as true. *Scott*, 975 F.2d at 368. If this allegation is true, Heintz and his law firm fall within the statutory definition of "debt collector" and the Act regulates their conduct.

In an attempt to escape this definition, Heintz and his law firm make an appeal to common sense. They argue that the Act was never meant to reach reasonable debt collection practices, such as litigation. It was only meant to cover the seamier practices of debt collection, such as late-night phone calls and other abusive conduct. Basically, they argue—with some indignation—that they are lawyers and not mere debt collectors. But the Act makes no such distinction; it has not since the 1986 amendment eliminating the attorney exemption. Under the Act as presently written, lawyers can be debt collectors, as long as they engage in the business of debt collection.

This view comports with the Fourth Circuit's decision in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992). There the court faced the same question: whether a lawyer in the course of litigation may be considered a debt collector under the Act. The court interpreted the plain meaning of the statute, and concluded that a lawyer may be con-

sidered a debt collector, as long as he meets the statutory definition. The court was not persuaded by the lawyer's argument that there was some obvious distinction between the practice of law and debt collection: "[w]e do not accept [the lawyer's] argument that he was engaged in the practice of law, not the collection of debts. We find this to be an artificial distinction. No matter what name is applied to [the lawyer's] activities, it is clear that the 'principal purpose' of his work was the collection of debt." *Id.* at 316.

The Sixth Circuit has reached a contrary result. In *Green*, 9 F.3d 18, the court considered whether a lawyer, by filing a complaint, qualified as a debt collector under the Act. The court concluded that "[a]n examination of the [Act] in context reveals that it was not intended to govern attorneys engaged solely in the practice of law. A contrary result would produce absurd outcomes." *Green*, 9 F.3d at 21. After demonstrating how literal enforcement could interfere with normal litigation, the court proceeded to rely on legislative history to support its position that Congress never intended the Act to reach litigation activities.

As the Sixth Circuit noted, there are conceivable problems with regulating attorneys in their debt collection efforts. Unlike the Sixth Circuit, however, our analysis of the statute ends with its language; we do not reach the legislative history. It appears that by removing the attorney exemption without otherwise adjusting the statute, Congress—wittingly or not—proscribed even certain litigation-related debt collection activities. There may be abundant reasons why Congress should not regulate litigation aimed at collecting debts. But in drafting a broad statute, Congress entered all areas inhabited by debt collectors, even litigation. We must faithfully apply the law as Congress drafted it. We should not disregard plain statutory language in order to impose on the statute what we may consider a more reasonable meaning. *See Matter Witkowski*, 16 F.3d 739, 745 (7th Cir. 1994) ("Even if there were some justification for concern, courts cannot re-write statutes.").

So the Act reaches lawyers engaged in litigation. But in order for the lawyers to be subject to liability under the Act, the litigation must entail some proscribed debt collection activity. Jenkins alleged that Heintz and his law firm engaged in two proscribed activities: adding an unauthorized charge to the debt, in violation of §1692f, and using deceptive means to collect a debt, in violation of §1692e.

Section 1692f provides in part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

The installment contract authorized the bank to purchase loss or damage insurance for the car if Jenkins failed to. It did not authorize the bank to purchase a financial protection policy to insure against default, and then to pass that cost of that policy onto Jenkins. If, as Jenkins alleged in her complaint, the attorneys charged her for the costs of a financial protection policy, the charge would not have been authorized. At the motion to dismiss stage we accept Jenkins' allegation that the attorneys charged her for a financial protection policy rather than for simple car insurance. Heintz and his law firm do not address this point in their brief. So, without more, we must conclude that Jenkins states a claim under §1692f(1).

Jenkins next claims that the unauthorized charge was false, deceptive and misleading. Section 1692e provides in part that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Again, if the facts are as Jenkins contends—that Heintz and his law firm knew the insurance charge was unauthorized, but tried to pass

it off anyway—then she states a claim. Because we are required to accept her allegations in this respect as true, we conclude that she does state a claim. Knowingly making unauthorized charges in connection with debt collection is at least deceptive and misleading.

III. Conclusion

In 1977, Congress wielded the weapon of consumer legislation against some obvious targets: late night phone calls, harassment and other abuses common in debt collection. But when it removed the attorney exemption nine years later, it expanded the statute's impact to include some attorneys engaged in debt collection litigation. We are not authorized to second-guess Congress by reading out of the statute certain intrusions we could consider unwarranted. Nor are we allowed to reconstruct the statute's plain meaning by reference to legislative history. We may only apply the law as Congress drafted it. We therefore reverse the district court's determination that the Act does not apply to attorneys in the course of litigation to collect debts. There is no longer an attorney exemption in the Act, and we cannot create one by judicial fiat. We also reverse the district court's determination that the attorneys' actions were not of the type proscribed by the Act. At the motion to dismiss stage, we accept the allegations made in the complaint as true. If Heintz and his law firm acted in the manner Jenkins alleged, then they fall within the broad scope of the Act. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

DARLENE JENKINS,	)	
	)	
Plaintiff,	)	93 C 1332
v.	)	
	)	Judge
GEORGE W. HEINTZ; and	)	George M. Marovich
BOWMAN, HEINTZ, BOSCIA	)	
& MCPHEE,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Darlene Jenkins ("Jenkins") filed suit against Defendants George W. Heintz and Bowman, Heintz, Boscia & McPhee ("Bowman") alleging that Bowman violated the Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"). Defendants are attorneys who were retained by a creditor to pursue litigation against a debtor who had defaulted on a loan. Bowman sent a letter to Jenkins' attorney in an effort to settle the pending lawsuit. Jenkins alleges that this letter constituted a violation of §§1692(e) and 1692(f) in that certain insurance charges were allegedly added to the debt which were not payable by the debtors. Defendants move to dismiss the complaint on the grounds that Bowman's filing of the suit and sending the settlement letter were purely legal activities and therefore the FDCPA is inapplicable. For the following reasons, we grant the motion to dismiss.

BACKGROUND

Defendant Heintz is an attorney and a partner in the Bowman law firm. Gainer Bank is a client of the Bowman

law firm and has a large number of customers who have signed retail installment contracts for the purchase of motor vehicles.

On July 9, 1992, Heintz wrote a letter to Darlene Jenkins detailing her indebtedness to his client, Gainer Bank, including a debt for premiums for insurance charged to Jenkins as part of her installment contract. This indebtedness arose from Jenkins' default on an automobile installment contract. Gainer Bank's contracts provide that the buyer shall keep the vehicle insured against loss or damage, and if the buyer fails to do so, the creditor (Bank) can purchase the necessary insurance to cover the vehicle. The pertinent language provides:

> . . . if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, [and that] if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins claims that Defendants violated the FDCPA by sending letters demanding payment for the allegedly unauthorized insurance and filing collections actions demanding payment for allegedly unauthorized insurance. The Heintz letter outlines Jenkins' indebtedness and ends with the following language:

> I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate $3000.00 was due. $3000.00 added to the $4,173.00 for insurance along with the late charges

> on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession. This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

Plaintiff contends that this letter violated the FDCPA because a portion of the debt owed Bowman's client was allegedly not allowed under the contract. Defendant claims that this complaint should be dismissed because the filing of the lawsuit and the letter pursuing settlement discussions are purely legal activities and therefore the FDCPA does not apply.

DISCUSSION

When reviewing a motion to dismiss we must assume the truth of all well-pleaded factual allegations and make all possible inferences in favor of the plaintiff. *Janowsky v. United States*, 913 F.2d 393, 395 (7th Cir. 1990); *Rogers v. United States*, 902 F.2d 1268, 1269 (7th Cir. 1990). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gorski v. Troy*, 929 F.2d 1183, 1186 (quoting *Conley v. Gibson*, U.S. 41, 45-6 (1957)).

The FDCPA was originally designed to prevent abusive actions by debt collectors. In keeping with this goal it outlines certain practices from which debt collectors must refrain. As it was originally drafted, the Act specifically excluded attorneys within the definition of "debt collectors" under 15 U.S.C.A. §1692a(6). However, in 1986 Congress amended the FDCPA to delete the attorney exclusion. Pub. L. 99-361, 100 Stat. 768. Now, the language

of the Act includes attorneys who represent creditors in debt collection actions.

Various courts have addressed the issue of whether an attorney acts as a debt collector in an array of fact patterns. A number of courts have held that the FDCPA applies to attorneys who collect debts on a regular basis. For instance, the Fourth Circuit has found that attorneys who regularly collect debts fall within the guidelines of the FDCPA. *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

In *Jones*, an attorney who was retained by banks to represent bank card divisions in lawsuits based on delinquent credit card accounts was held to be a debt collector under the FDCPA. *Id.* at 316. In coming to this conclusion, the Fourth Circuit stressed the fact that at least 70% of the attorney's legal fees were generated from the collection of debts. The court held that the attorney in *Jones* not only collected debts on a regular basis but also that the "principal purpose" of his job was to collect debts. *Id.*

On the opposite end of the spectrum exist the courts that have examined the attorney's role and have held that an attorney who regularly files legal actions for the purpose of collecting debts is not a debt collector if his primary role in collecting those debts is purely of a legal nature. *See, e.g. Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992); *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139, 1140 (S.D.N.Y. 1990); *Fireman's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D. N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S.2d 950 (1991).

We do not find that these authorities conflict with each other. The primary focus of the courts in ascertaining whether the FDCPA applies to attorneys is whether the

attorney's principal role is to collect debts. This question is not answered within a vacuum. Instead, the courts take into account a variety of factors including the percentage of debt collection compared to other legal work performed by the firm, the circumstances of the debtor in relation to the attorney, and the behavior alleged to have violated the Act.

In the case at hand, we find that the letter sent by Bowman to Jenkins does not rise to the level of a "dunning" letter as proscribed by the Act. The letter, instead, appears to set forth a rational, and calm approach to remedying a conflict between the parties. To classify this missive as the type of threatening and abusive practice which violates this Act would not correspond with the purpose behind the enactment of the FDCPA.

Legislative history illuminates the purpose of this Act. The amendment in 1986 was designed to regulate activities such as late night telephone calls to consumers, calls to consumers' employers, frequent and repeated calls, threats of legal action on relatively small amounts of debt, simulation of legal process, harassment, threats of seizure of property and the disclosure of consumers' debt to third parties. *See* H. Rpt. 99-405, 99th Cong., 2d Sess. 1-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 1755. A central purpose of the FDCPA is to ensure that the consumer pay the amount that is owed and is not dunned for amounts which he does not owe. Thus, §1692 precludes the false representation of any amount of a debt. The Official Staff Commentary states:

> Attorneys or law firms that engage in the traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but not those whose practice is limited to legal activities are not covered.

Commentary to §803(6)-2, 53 Fed. Reg. at 50100. Representative Annunzio summed up the purpose after the enactment of the Act by saying:

> Only collection activities, not legal activities, are covered by the Act. . . . The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it did not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.

132 Cong. Rep. H 10031 (1986).

It is evident from the language of the statute and the case law in this area that the FDCPA covers actions by attorneys who engage in the typical debt collecting activities proscribed by the Act. However, it is also evident that not all actions engaged in by attorneys who collect debts violate the Act. The letter before us is a level-headed and reasonable request to settle a conflict between two parties who are in disagreement regarding a debt. It is not threatening, harassing or intimidating. It was not sent to the debtor directly, but rather, to the debtor's attorney. It was not one of a long line of abusive practices, but rather a single plea for settlement purposes. We do not find that this attorney action falls within the meaning of the FDCPA.

We therefore dismiss the complaint for failure to state a claim upon which relief can be granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS,	)	
	)	
Plaintiff,	)	93 C 1332
v.	)	
	)	Judge Marovich
GEORGE W. HEINTZ; and	)	Magistrate Judge
BOWMAN, HEINTZ, BOSCIA	)	Weisberg
& MCPHEE,	)	
Defendants.	)	

AMENDED COMPLAINT

Plaintiff, Darlene Jenkins, complains as follows against defendants George W. Heintz ("Heintz") and Bowman, Heintz, Boscia & McPhee ("Bowman firm"):

INTRODUCTION

1. This action is brought to remedy defendants' repeated violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 15 U.S.C. §1692k and 28 U.S.C. §1331. Venue is proper in this District because the acts complained of took place here.

PARTIES

3. Plaintiff is an individual who resides in Chicago, Illinois. She is a "consumer" as defined by the FDCPA, 15 U.S.C. §1692a(3).

4. Defendant Heintz is an attorney and a partner in the Bowman firm, a law firm. Both defendants have offices at 1000 E. 80th Place, Merrillville, Indiana 46410.

5. Both defendants are regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a "debt collector" as defined in the FDCPA, 15 U.S.C. §1692a(6).

CLASS ALLEGATIONS

6. This action is brought as a class action. Plaintiff tentatively defines the class as all persons from whom defendants demanded payment, through correspondence or suit, on behalf of Gainer Bank for premiums for purported automobile insurance issued by Balboa Insurance Company.

7. The class is so numerous that joinder of all members is impractical.

8. There are questions of law and fact common to the class, which predominate over any questions affecting only individual class members. These questions include:

a. Whether the insurance in fact covered Gainer Bank against credit loss or default.

b. Whether the insurance was authorized to be added to the class members' indebtedness by the standard form contracts that defendants were purporting to enforce.

c. The appropriate amount of statutory damages to be assessed against defendants.

9. There are no individual questions relating to liability, other than whether a class member received one of the offending demands, which can be determined by ministerial inspection of defendant's records.

10. Plaintiff will fairly and adequately protect the interests of the class. She is committed to vigorously litigating this matter. She is greatly annoyed at being the victims of defendants' illegal practice and wishes to see that the wrong is remedied. To that end, she has retained counsel experienced in handling class claims and claims involving unlawful business practices. Neither plaintiff nor her counsel have any interests which might cause them not to vigorously pursue this claim.

11. Plaintiffs' claim is typical of the claims of the class, which all arise from the same operative facts and are based on the same legal theories.

12. A class action is a superior method for the fair and efficient adjudication of this controversy. The very essence of defendants' conduct is to misrepresent that large sums added to the class members' debts is for matters authorized by contract, when that is not the case. The class members have no reasonable means of knowing that the additional charges are not what they are represented to be. Accordingly, failure to permit a class action will result in a failure of justice.

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

13. Defendants regularly collect debts for, among other persons, Gainer Bank, of Gary, Indiana. Gainer Bank has a large number of customers who signed retail installment contracts for the purchase of motor vehicles. Plaintiff is one such individual.

14. Gainer Bank's contracts provided that the buyer will "keep the collateral fully insured against loss or damage," and that "if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor

can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect."

15. In fact, the insurance was "financial protection insurance" issued by a Balboa Insurance Company and which covered Gainer Bank against various types of defaults by the customer on his or her obligation, such as expenses incurred in repossessing a car from a consumer who defaulted, the failure of a customer to pay persons who performed work on the car, resulting in a mechanic's lien, and errors in perfecting security interests. The "financial protection insurance" also indemnified Gainer against liability which it might incur under federal law as a result of a breach of warranty by an automobile dealer or manufacturer (the "holder in due course endorsement").

16. The standard form contract between Gainer and its motor vehicle installment customers, including Ms. Jenkins, did not authorize any such insurance to be charged to her account. Gainer Bank could, of course, procure insurance against credit loss, as long as it did so at its own expense.

17. The insurance charged to Ms. Jenkins' account was not insurance authorized by any agreement between Ms. Jenkins and Gainer Bank and could not be honestly represented as insurance on her automobile.

18. The Bowman firm had actual knowledge of the true nature of the insurance obtained by Gainer Bank no later than April 1992. A complaint filed by the Bowman firm in April 1992 includes amounts for "recovered repossession expense" paid by the Bank's insurance. "Recovered

repossession expense" is not, of course, covered by insurance protecting a car against loss or damage. It is one of the coverages provided by the "financial protection" insurance that Gainer obtained.

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

19. On July 9, 1992, Heintz wrote the letter attached hereto as *Exhibit A*, demanding payment of a debt purportedly owed by Darlene Jenkins. The contents of *Exhibit A* were intended to be, and were in fact, transmitted to Ms. Jenkins. The indebtedness consisted primarily of premiums for insurance allegedly charged to Ms. Jenkins pursuant to the language quoted above.

20. On information and belief, based on a review of court filings, other letters demanding payment for the insurance premiums have been written to other consumers or their representatives.

FILING OF COLLECTION ACTIONS DEMANDING PAYMENT OF UNAUTHORIZED AMOUNTS

21. Over the last few years, Heintz and the Bowman firm filed numerous collection actions on behalf of Gainer Bank in which the amount claimed included sums charged by the Bank, subsequent to the inception of the contract, purportedly for insurance against loss or damage to the collateral. Most resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges.

22. One such collection action demanding payment for the unauthorized insurance was filed against plaintiff.

FRAUDULENT CONCEALMENT

23. While the collection actions against plaintiff and some class members were filed, and the demands against some class members were made, more than one year prior to the filing of this action, defendants fraudulently concealed their violation of the FDCPA by misrepresenting, both in the complaint and in correspondence such as *Exhibit A*, the true nature of the "insurance" for which payment was demanded.

24. Plaintiff and the class members had no knowledge of the truth and believed that the insurance procured was simply insurance against loss of or damage to the collateral until 1993. Accordingly, the statute of limitations is tolled.

25. Defendants continued to pursue their demands for payment of the unauthorized insurance by plaintiff until a date within one year of the filing of this action.

DAMAGES

26. The premiums charged in each case amount to $2,000 to $4,000. In addition, interest is charged on the premiums.

27. The inflated debt was reported to credit reporting agencies, damaging plaintiff's credit. On information and belief, the same occurred in the case of other class members.

28. As a result of defendants' demand for payment, plaintiff has suffered mental anguish and has been forced to expend time and money defending against such unauthorized demands.

VIOLATIONS COMPLAINED OF

29. Defendants violated the FDCPA in the following respects by sending letters, such as *Exhibit A*, demanding payment for the unauthorized insurance and filing collection actions demanding payment for the unauthorized insurance:

a. Defendants violated 15 U.S.C. §1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect any debt," and defines "unfair or unconscionable means" to include adding amounts to the principal obligation "unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

b. Defendants violated 15 U.S.C. §1692e, which prohibits "any false, deceptive or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of . . . the character . . . of any debt," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."

WHEREFORE, plaintiff requests that the Court grant the following relief in her favor and in favor of the class, and against defendants:

c. The maximum amount of statutory damages provided under 15 U.S.C. §1692k.

d. Appropriate actual damages to plaintiff and any class member who incurred actual damages.

e. Attorney's fees, litigation expenses and costs.

f. Such other and further relief as is appropriate.

EXHIBIT A

Please refer to our File No.
238719

July 9, 1992

Attorney Steven Morton
Ste. 563, 221 N. LaSalle Street
Chicago, IL 60601

RE: Gainer Bank vs. Darlene Jenkins
89M1-147179

Dear Mr. Morton:

This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:

1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance add the price to the contract balance and shall be payable at the then annual percentage rate in effect.

2. This contractual default and failure to keep the vehicle properly insured happen . . four occasions. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time—November 19, 1987 through April 11, 1991 and paid therefore the amount of $4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled and there was a return refund premium of $347.00 which was properly applied to the account.

3. I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate $3,000.00 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.

This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

If you have questions or need additional information, please be in contact with me.

Very truly yours,

/s/ George W. Heintz /s/
Merrillville Office
Member of Indiana & Illinois Bars

GWH/dk

Enclosure

STATUTES INVOLVED

§1692a. Definitions (original)

As used in this Subchapter—

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay a debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (G) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any

name other than his own which would indicate that a third person is collecting or attempting to collected such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include—

(A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;

(B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;

(C) any officer or employee of the United States of any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;

(D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditor;

(F) any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client; and

(G) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term "location information" means a consumer's place of abode and his telephone number at such place, or his place of employment.

§1692a Definitions (as amended in 1986)

As used in this Subchapter–

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collected such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include–

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amount to creditor; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(G) Redesignated (F).

§1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The false representation or implication that the debt collector is vouched for, bonded by, or affiliated with the United States or any State, including the use of any badge, uniform, or facsimile thereof.

(2) The false representation of–

(A) the character, amount, or legal status of any debt; or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

(3) The false representation or implication that any individual is an attorney or that any communication is from an attorney.

(4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless such action is lawful and the debt collector or creditor intends to take such action.

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

(6) The false representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the consumer to—

(A) lose any claim or defense to payment of the debt; or

(B) become subject to any practice prohibited by this subchapter.

(7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.

(8) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed.

(9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official,

or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

(11) Except as otherwise provided for communications to acquire location information under section 1629b of this title, the failure to disclose clearly in all communications made to collect a debt or to obtain information about a consumer, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose.

(12) The false representation or implication that accounts have been turned over to innocent purchasers for value.

(13) The false representation or implication that documents are legal process.

(14) The use of any business, company, or organization name other than the true name of the debt collector's business, company, or organization.

(15) The false representation or implication that documents are not legal process forms or do not require action by the consumer.

(16) The false representation or implication that a debt collector operates or is employed by a consumer reporting agency as defined by section 1681a(f) of this title.

§1692f Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without

limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(2) The acceptance by a debt collector from any person of a check or other payment instrument postdated by more than five days unless such person is notified in writing of the debt collector's intent to deposit such check or instrument not more than ten nor less than three business days prior to such deposit.

(3) The solicitation by a debt collector of any postdated check or other postdated payment instrument for the purpose of threatening or instituting criminal prosecution.

(4) Depositing or threatening to deposit any postdated check or other postdated payment instrument prior to the date on such check or instrument.

(5) Causing charges to be made to any person for communications by concealment of the true purpose of the communication. Such charges include, but are not limited to, collect telephone calls and telegram fees.

(6) Taking or threatening to take any nonjudicial action to effect dispossession or disablement of property if—

(A) there is no present right to possession of the property claimed as collateral through an enforceable security interest;

(B) there is no present intention to take possession of the property; or

(C) the property is exempt by law from such dispossession or disablement.

(7) Communicating with the consumer regarding a debt by post card.

(8) Using any language or symbol, other than the debt collector's address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business.

§1692i **Legal actions by debt collectors**

(a) Any debt collector who brings any legal action on a debt against any consumer shall—

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1) bring such action only in the judicial district or similar legal entity—

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

(2)

No. 94-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

JOANNE FAULKNER
(Counsel of Record)
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
Attorney for Respondent.

Of Counsel:
DANIEL A. EDELMAN
EDELMAN & COMBS
135 S. LaSalle Street
Suite 1006
Chicago, Illinois 60603
(312) 739-4200

Washington, D.C. • THIEL PRESS • (202) 328-3286

11

QUESTION PRESENTED FOR REVIEW

Is an attorney engaged solely to prosecute litigation against a consumer a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. §1692a(6))?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Sources:

No. 94-367

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent Darlene Jenkins prays that the Court decline to issue a writ of certiorari in this case.

REASON FOR DENYING THE WRIT

Reluctantly, Respondents are forced to agree with Petitioners that the Sixth Circuit decision in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), has created a conflict among the Circuit Courts as to whether an attorney engaged solely to prosecute litigation against a consumer can ever be considered a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. §1692a(6)) ("FDCPA"). However, because the Seventh Circuit's interpretation of the FDCPA, as amended in 1986, is clearly correct for a number of reasons, this Court should not grant certiorari.

The plain language of the statute conclusively supports the Seventh Circuit's reasoning. The FDCPA applies to "any person who . . . regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. §1692a(6). This language, when combined with Congress' 1986 removal of the blanket attorney exception of §1692a(6)(F), makes it clear that attorneys who fit the statutory definition, because they "regularly" engage in debt collection, come under the auspices of the Act. As the Ninth Circuit recently stated, "There is simply no mention of attorneys in the current definition of 'debt collector' or its exceptions; nor is there any distinction drawn between legal and non-legal activities. Nothing currently in the text of the FDCPA hints at the conspicuous solicitude for the legal profession the [Petitioners] propose[ ]." *Fox v. Citicorp Credit Services, Inc.*, 15 F.2d 1507, 1512 (9th Cir. 1994).

In addition, as the Ninth Circuit's opinion in *Fox* also points out, Petitioners' reliance on the legislative history of the FDCPA is misplaced. There is no "clearly-expressed intention necessary to overcome the strong pre-

sumption that Congress expresses its intent through the language it chooses.' " *Id.* at 1512 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). Even were the language of the FDCPA not clear, Petitioners base their argument regarding the intent of Congress on a single statement by Representative Annunzio, not even to the House of Representatives, which occurred subsequent to the passage of a bill. The remarks by Rep. Annunzio were inserted in the Congressional Record pursuant to "orders". (*See attachment*) The probative value of that claim is further undermined by the House Report, which states "that attorneys in the business of collecting debts be subject to all provision of the Act, if they meet the definition of debt collector." *Fox*, 15 F.3d at 1513 (quoting House Report 405, at 3, 1986 U.S.C.A.A.N. at 1754).

There is one final reason to deny certiorari. If Respondent proves her allegations, the conduct complained about by her – the deliberate attempt to pass on to Respondent the cost of a financial protection policy bought to insure against default – is clearly illegal. Although Petitioners argue that placing litigation activities under the rubric of the FDCPA may have absurd results in the future, granting Petitioners the exemption they seek would have the effect of producing an anomalous result now.

Simply put, four of five Circuits that have decided this issue in the last three years have unequivocally stated that there is nothing in the FDCPA that would allow for the broad exemption which Petitioner seek. *Accord, Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). The one divergent opinion did so on the grounds that such a result "would produce absurd outcomes." *Green*, 9 F.3d at 21. Whether certain provisions of the

FDCPA, on which the Sixth Circuit focused, might properly be construed not to apply to attorneys conducting litigation is not the issue before the court. The only question is whether all attorneys are wholly exempt for any act involving litigation when there is not a word to this effect in the statute. As this Court has previously observed, "Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided." *Commissioner v. Asphalt Products Co., Inc.*, 482 U.S. 117, 121 (1987). Since the language of the FDCPA is clear, the Seventh Circuit opinion below was correct. Respondent respectfully asks this Court to deny certiorari.

Respectfully submitted,

JOANNE FAULKNER
(Counsel of Record)
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395
Attorney for Respondent.

Of Counsel:
DANIEL A. EDELMAN
EDELMAN & COMBS
135 S. LaSalle Street
Suite 1006
Chicago, Illinois 60603
(312) 739-4200

APPENDIX A

LEVEL 1 – 18 OF 25 ITEMS

Congressional Record – House

Tuesday, October 14, 1986

99th Cong. 2d Sess.

132 Cong Rec H 10031

REFERENCE: Vol. 132 No. 141 – Part 2

TITLE: ATTORNEYS AND THE FAIR DEBT COLLECTION PRACTICES ACT

SPEAKER: MR. ANNUNZIO

TEXT:

Text that appears in UPPER CASE identifies statements or insertions which are not spoken by a Member of the House on the floor.

132 Cong Rec H 10031 Tuesday, October 14, 1986

The SPEAKER pro tempore. Under a previous order of the House, the gentleman from Illinois [Mr. Annunzip] is recognized for 5 minutes.

MR. ANNUNZIO. MR. SPEAKER, ON JULY 9, LEGISLATION REPEALING THE ATTORNEY EXEMPTION TO THE FAIR DEBT COLLECTION PRACTICES ACT BECAME LAW. THAT LEGISLATION, WHICH I INTRODUCED, REQUIRES THAT ATTORNEYS IN THE DEBT COLLECTION BUSINESS COMPLY WITH THE LAW THAT PROTECTS CONSUMERS AGAINST ABUSIVE, DECEPTIVE, AND UNFAIR

DEBT COLLECTION PRACTICES. THE LEGISLATION WAS A DIRECT RESPONSE TO THE EXPLOSIVE GROWTH IN THE NUMBER OF LAW FIRMS THAT HAD ENTERED THE DEBT COLLECTION BUSINESS AND WERE ABUSING THE EXEMPTION THE ORIGINAL FAIR DEBT COLLECTION PRACTICES ACT PROVIDED. WITH THE REPEAL OF THE EXEMPTION, ATTORNEYS IN THE DEBT COLLECTION BUSINESS MUST COMPLY WITH THE ACT WHEN THEY COLLECT CONSUMER DEBTS.

THE PROLIFERATION OF ATTORNEY COLLECTORS HAS GROWN DRAMATICALLY OVER THE PAST SEVERAL YEARS, AND AN ESTIMATED 5,000 ATTORNEYS ARE NOW INVOLVED IN DEBT COLLECTION. REPEAL OF THE EXEMPTION WAS INTENDED TO PLACE ATTORNEY COLLECTORS AND LAY COLLECTORS ON AN EQUAL FOOTING. IT ENSURES THAT ATTORNEYS USE FAIR DEBT COLLECTION TACTICS. IT ENSURES THAT LAY COLLECTORS, WHO ARE REQUIRED BY THE ACT TO REFRAIN FROM USING ABUSIVE TACTICS, ARE NOT COMPETITIVELY DISADVANTAGED BY THE ACT.

132 Cong Rec H 10031 Tuesday, October 14, 1986

ETHICAL ATTORNEYS NEED HAVE NO CONCERNS ABOUT THE IMPACT OF THE ACT ON THEIR PRACTICE. THE FAIR DEBT COLLECTION PRACTICES ACT REGULATES DEBT COLLECTION, NOT THE PRACTICE OF LAW. CONGRESS REPEALED THE ATTORNEY EXEMPTION TO THE ACT, NOT BECAUSE OF ATTORNEY'S CONDUCT IN THE

COURTROOM, BUT BECAUSE OF THEIR CONDUCT IN THE BACKROOM. ONLY COLLECTION ACTIVITIES, NOT LEGAL ACTIVITIES, ARE COVERED BY THE ACT.

NOT ALL ATTORNEYS AE COVERED BY THE ACT. IT DOES NOT APPLY TO THE COLLECTION OF COMMERCIAL DEBTS. IT APPLIES ONLY TO THOSE ATTORNEYS WHOSE BUSINESS HAS THE PRINCIPAL PURPOSE OF THE COLLECTION OF DEBTS OR WHO REGULARLY COLLECT OR ATTEMPT TO COLLECT DUES TO THIRD PARTIES. ATTORNEYS, LIKE ANY OTHER PERSONS WHO ONLY IRREGULARLY OR OCCASIONALLY COLLECT DEBTS, ARE NOT COVERED.

SOME ATTORNEYS HAVE CLAIMED THAT THE ACT WILL RESTRICT THEIR ABILITY TO PRACTICE LAW. NOTHING COULD BE FURTHER FROM THE TRUTH. THE ACT APPLIES TO ATTORNEYS WHEN THEY ARE COLLECTING DEBTS, NOT WHEN THEY ARE PERFORMING TASKS OF A LEGAL NATURE.

SUGGESTIONS THAT THE REPEAL OF THE ATTORNEY EXEMPTION PROHIBITS BRINGING LEGAL ACTION IS AN ABSURD READING OF THE ACT. THE ACT ONLY REGULATES THE CONDUCT OF DEBT COLLECTORS, IT DOES NOT PREVENT CREDITORS, THROUGH THEIR ATTORNEYS, FROM PURSUING ANY LEGAL REMEDIES AVAILABLE TO THEM.

DEBT COLLECTION PRACTICES. THE LEGISLATION WAS A DIRECT RESPONSE TO THE EXPLOSIVE GROWTH IN THE NUMBER OF LAW FIRMS THAT HAD ENTERED THE DEBT COLLECTION BUSINESS AND WERE ABUSING THE EXEMPTION THE ORIGINAL FAIR DEBT COLLECTION PRACTICES ACT PROVIDED. WITH THE REPEAL OF THE EXEMPTION, ATTORNEYS IN THE DEBT COLLECTION BUSINESS MUST COMPLY WITH THE ACT WHEN THEY COLLECT CONSUMER DEBTS.

THE PROLIFERATION OF ATTORNEY COLLECTORS HAS GROWN DRAMATICALLY OVER THE PAST SEVERAL YEARS, AND AN ESTIMATED 5,000 ATTORNEYS ARE NOW INVOLVED IN DEBT COLLECTION. REPEAL OF THE EXEMPTION WAS INTENDED TO PLACE ATTORNEY COLLECTORS AND LAY COLLECTORS ON AN EQUAL FOOTING. IT ENSURES THAT ATTORNEYS USE FAIR DEBT COLLECTION TACTICS. IT ENSURES THAT LAY COLLECTORS, WHO ARE REQUIRED BY THE ACT TO REFRAIN FROM USING ABUSIVE TACTICS, ARE NOT COMPETITIVELY DISADVANTAGED BY THE ACT.

132 Cong Rec H 10031 Tuesday, October 14, 1986

ETHICAL ATTORNEYS NEED HAVE NO CONCERNS ABOUT THE IMPACT OF THE ACT ON THEIR PRACTICE. THE FAIR DEBT COLLECTION PRACTICES ACT REGULATES DEBT COLLECTION, NOT THE PRACTICE OF LAW. CONGRESS REPEALED THE ATTORNEY EXEMPTION TO THE ACT, NOT BECAUSE OF ATTORNEY'S CONDUCT IN THE

COURTROOM, BUT BECAUSE OF THEIR CONDUCT IN THE BACKROOM. ONLY COLLECTION ACTIVITIES, NOT LEGAL ACTIVITIES, ARE COVERED BY THE ACT.

NOT ALL ATTORNEYS AE COVERED BY THE ACT. IT DOES NOT APPLY TO THE COLLECTION OF COMMERCIAL DEBTS. IT APPLIES ONLY TO THOSE ATTORNEYS WHOSE BUSINESS HAS THE PRINCIPAL PURPOSE OF THE COLLECTION OF DEBTS OR WHO REGULARLY COLLECT OR ATTEMPT TO COLLECT DUES TO THIRD PARTIES. ATTORNEYS, LIKE ANY OTHER PERSONS WHO ONLY IRREGULARLY OR OCCASIONALLY COLLECT DEBTS, ARE NOT COVERED.

SOME ATTORNEYS HAVE CLAIMED THAT THE ACT WILL RESTRICT THEIR ABILITY TO PRACTICE LAW. NOTHING COULD BE FURTHER FROM THE TRUTH. THE ACT APPLIES TO ATTORNEYS WHEN THEY ARE COLLECTING DEBTS, NOT WHEN THEY ARE PERFORMING TASKS OF A LEGAL NATURE.

SUGGESTIONS THAT THE REPEAL OF THE ATTORNEY EXEMPTION PROHIBITS BRINGING LEGAL ACTION IS AN ABSURD READING OF THE ACT. THE ACT ONLY REGULATES THE CONDUCT OF DEBT COLLECTORS, IT DOES NOT PREVENT CREDITORS, THROUGH THEIR ATTORNEYS, FROM PURSUING ANY LEGAL REMEDIES AVAILABLE TO THEM.

132 Cong Rec H 10031 Tuesday, October 14, 1986

ACTIONS WHICH CAN ONLY BE TAKEN BY THOSE POSSESSING A LICENSE TO PRACTICE LAW ARE OUTSIDE THE SCOPE OF THE ACT. THE FILING OF A COMPLAINT IS NOT COVERED BY THE ACT. SINCE IT IS NOT COVERED UNDER THE ACT, THERE IS NO REQUIREMENT THAT ATTORNEYS INCLUDE THE NOTICES REQUIRED UNDER SECTION 809 OF THE ACT IN LEGAL FILINGS. FURTHER, THERE IS NO REQUIREMENT THAT THE ATTORNEY MUST PROVIDE VERIFICATION OF THE DEBT AS REQUIRED UNDER THAT SECTION OF THE ACT IN THE CONTEXT OF LEGAL PROCEEDINGS. SINCE THE ATTORNEY WILL BE REQUIRED TO PROVE THE VALIDITY OF THE DEBT AS AN ELEMENT OF THE LEGAL PROCEEDINGS, THERE IS NO NEED TO REQUIRE ADDITIONAL VALIDATION.

REPEAL OF THE ATTORNEY EXEMPTION DOES NOT INFRINGE UPON THE PRACTICE OF LAW BY ATTORNEYS. IT DOES ASSURE THAT CONSUMERS ARE PROTECTED FROM UNFAIR AND UNETHICAL DEBT COLLECTION PRACTICES, REGARDLESS OF THE PROFESSION OF THE COLLECTOR.

(3)

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601
(312) 704-3000
Attorneys for Petitioners

DANIEL A. EDELMAN
Counsel of Record
EDELMAN & COMBS
135 South LaSalle Street
Suite 1006
Chicago, Illinois 60603
(312) 739-4203
Attorneys for Respondent

PETITION FOR CERTIORARI FILED AUGUST 25, 1994
CERTIORARI GRANTED OCTOBER 31, 1994

42pp

TABLE OF CONTENTS

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,
Petitioners,

v.

DARLENE JENKINS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 3, 1993–

COMPLAINT; jury demand–Civil cover sheet–Appearance(s) of James Eric Vander Arend, Cathleen M. Combs, Tara Goodwin Redmond, Daniel A. Edelman as attorney(s) for plaintiff with Rule 39 affidavits (1 original and 2 copies summons(es) issued.) (Documents: 1-1 through 1-7). (rm) [Entry date 03/04/93]

March 3, 1993–

RECEIPT regarding payment of filing fee paid; on 3/3/93 in the amount of $120.00, receipt #411036. (rm) [Entry date 03/04/93]

March 10, 1993–

AMENDED COMPLAINT [1-1] by plaintiff; jury demand (Exhibit) (is) [Entry date 03/11/93]

March 22, 1993–

RETURN OF SERVICE of summons and complaint executed upon defendant George W Heintz (Attachment). (cmp) [Entry date 03/23/93]

March 22, 1993–

RETURN OF SERVICE of summons and complaint executed upon defendant Bowman Heintz Boscia on 3/15/93 (Attachment). (cmp) [Entry date 03/23/93]

April 13, 1993–

ATTORNEY APPEARANCE for defendant by George William Spellmire, David Matthew Schultz. (rm) [Entry date 04/14/93]

April 13, 1993–

RULE 39 Affidavit of George William Spellmire (rm) [Entry date 04/14/93]

April 13, 1993–

RULE 39 Affidavit of David Matthew Schultz (rm) [Entry date 04/14/93]

April 15, 1993–

MOTION by defendant for enlargement of time within which to answer or otherwise plead to plaintiff's complaint; notice of motion. (rm)

April 15, 1993–

MINUTE ORDER of 4/15/93 by Hon. George M. Marovich: Defendants' motion for an extension of time to answer or otherwise plead to 5/11/93 is granted [8-1]. Mailed notice (rm)

May 18, 1993–

MOTION by plaintiff to admit Joanne S. Faulkner pro hac vice; notice of motion. (rm) [Entry date 05/19/93]

May 18, 1993–

MINUTE ORDER of 5/18/93 by Hon. George M. Marovich: Granting motion to admit Joanne S. Faulkner pro hac vice [10-1]. No notice (rm) [Entry date 05/19/93]

May 18, 1993–

ATTORNEY APPEARANCE for plaintiff by Joanne Faulkner. (rm) [Entry date 05/19/93]

May 18, 1993–

RULE 39 Affidavit of Joan S. Faulkner. (rm) [Entry date 05/19/93]

May 18, 1993–

MOTION by defendants to dismiss plaintiff's amended complaint; notice of motion. (rm) [Entry date 05/19/93]

May 18, 1993–

MINUTE ORDER of 5/18/93 by Hon. George M. Marovich: Plaintiff is to file answer to defendants' motion to dismiss plaintiff's amended complaint [14-1] by 6/8/93. Reply is to be filed by 6/22/93. Court will rule by mail. Mailed notice (rm) [Entry date 05/19/93]

June 4, 1993–

RESPONSE by plaintiff to defendants' motion to dismiss plaintiff's amended complaint [14-1] (Exhibits); Notice of filing. (rm) [Entry date 06/07/93]

June 16, 1993–

MOTION by defendants for an enlargement of time to answer plaintiff's first discovery request (Attachments); Notice of motion. (rm) [Entry date 06/17/93]

June 16, 1993–

MINUTE ORDER of 6/16/93 by Hon. George M. Marovich: Granting motion for an enlargement of time to answer plaintiff's first discovery request [17-1]. Discovery is stayed pending ruling on motion to dismiss. No notice (rm) [Entry date 06/17/93]

June 22, 1993–

REPLY by defendants in support of their motion to dismiss plaintiff's amended complaint [14-1] (rm) [Entry date 06/23/93]

July 26, 1993—

MEMORANDUM, OPINION, AND ORDER (rm) [Entry date 07/27/93]

July 26, 1993—

MINUTE ORDER of 7/26/93 by Hon. George M. Marovich: Defendants' motion to dismiss plaintiff's amended complaint [14-1] is granted. terminating case Mailed notice (rm) [Entry date 07/27/93]

July 26, 1993—

ENTERED JUDGMENT (rm) [Entry date 07/27/93]

July 28, 1993—

NOTICE OF APPEAL by plaintiff Darlene Jenkins from order [20-1], minute order [21-2] and judgment entered [22-1] (PAID $105.00) (Attachment); Notice of filing. (gm) [Entry date 07/29/93]

July 28, 1993—

MAILED LETTER regarding jurisdictional statement unacknowledged by plaintiff Darlene Jenkins. (gm) [Entry date 07/29/93]

July 28, 1993—

NOTICE OF APPEAL by plaintiff Darlene Jenkins from order [20-1], minute order [21-2] and judgment entered [22-1] (PAID $105.00) (Attachment); Notice of filing. (gm) [Entry date 07/29/93]

July 28, 1993—

MAILED LETTER regarding jurisdictional statement unacknowledged by plaintiff Darlene Jenkins. (gm) [Entry date 07/29/93]

July 30, 1993—

TRANSMITTED: Short record on appeal to the 7th Circuit comprising of transmittal letter, 7th Circuit Information Sheet, copy of notice of appeal, copy of order entered 07/26/93 and copy of docket entries. (gm)

July 30, 1993—

MAILED: Copies of notice of appeal, Circuit rule 10 letter to all counsel of record with 7th Circuit transcript information sheet, jurisdictional statement letter and docket entries to attorney Daniel A. Edelman. (gm)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS, Plaintiff,	)	
v.	)	No. 93 C 1332
GEORGE W. HEINTZ; and BOWMAN, HEINTZ, BOSCIA & MCPHEE, Defendants.	)	

COMPLAINT

Plaintiff, Darlene Jenkins, complains as follows against defendants George W. Heintz ("Heintz") and Bowman, Heintz, Boscia & McPhee ("Bowman firm"):

INTRODUCTION

1. This action is brought to remedy defendants' repeated violations of the federal Fair Debt Collection Practices Act, 15 U.S.C. §1692 et seq. ("FDCPA").

JURISDICTION AND VENUE

2. This Court has jurisdiction under 15 U.S.C. §1692k(d) and 28 U.S.C. §1331. Venue is proper in this District because the acts complained of took place here.

PARTIES

3. Plaintiff is an individual who resides in Chicago, Illinois. She is a "consumer" as defined by the FDCPA, 15 U.S.C. §1692a(3).

4. Defendant Heintz is an attorney and a partner in the Bowman firm, a law firm. Both defendants have offices at 1000 E. 80th Place, Merrillville, Indiana 46410.

5. Both defendants are regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a "debt collector" as defined in the FDCPA, 15 U.S.C. §1692a(6).

**DEMANDS FOR PAYMENT
OF UNAUTHORIZED AMOUNTS**

6. Defendants regularly collect debts for, among other persons, Gainer Bank, of Gary, Indiana. Gainer Bank has a large number of customers who signed retail installment contracts for the purchase of motor vehicles. Plaintiff is one such individual.

7. Gainer Bank's contracts provided that the buyer will "keep the collateral fully insured against loss or damage," and that "if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect."

8. In fact, the insurance was "financial protection insurance" issued by a Balboa Insurance Company and which covered Gainer Bank against various types of defaults by the customer on his or her obligation, such as expenses incurred in repossessing a car from a consumer who defaulted, the failure of a customer to pay persons who performed work on the car, resulting in a mechanic's lien, and errors in perfecting security interests. The "financial protection insurance" also indemnified Gainer against lia-

bility which it might incur under federal law as a result of a breach of warranty by an automobile dealer or manufacturer (the "holder in due course endorsement").

9. The standard form contract between Gainer and its motor vehicle installment customers, including Ms. Jenkins, did not authorize any such insurance to be charged to her account. Gainer Bank could, of course, procure insurance against credit loss, as long as it did so at its own expense.

10. The insurance charged to Ms. Jenkins' account was not insurance authorized by any agreement between Ms. Jenkins and Gainer Bank and could not be honestly represented as insurance on her automobile.

11. The Bowman firm had actual knowledge of the true nature of the insurance obtained by Gainer Bank no later than April 1992. A complaint filed by the Bowman firm in April 1992 includes amounts for "recovered repossession expense" paid by the Bank's insurance. "Recovered repossession expense" is not, of course, covered by insurance protecting a car against loss or damage. It is one of the coverages provided by the "financial protection" insurance that Gainer obtained.

DEMANDS FOR PAYMENT OF UNAUTHORIZED AMOUNTS

12. On July 9, 1992, Heintz wrote the letter attached hereto as *Exhibit A*, demanding payment of a debt purportedly owed by Darlene Jenkins. The contends of *Exhibit A* were intended to be, and were in fact, transmitted to Ms. Jenkins. The indebtedness consisted primarily of premiums for insurance allegedly charged to Ms. Jenkins pursuant to the language quoted above.

FILING OF COLLECTION ACTIONS DEMANDING PAYMENT OF UNAUTHORIZED AMOUNTS

13. Over the last few years, Heintz and the Bowman firm filed numerous collection actions on behalf of Gainer Bank in which the amount claimed included sums charged by the Bank, subsequent to the inception of the contract, purportedly for insurance against loss or damage to the collateral. Most resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges.

14. One such collection action demanding payment for the unauthorized insurance was filed against plaintiff.

15. While said action was filed against plaintiff more than one year prior to the filing of this action, defendants fraudulently concealed their violation of the FDCPA by misrepresenting, both in the complaint and in correspondence such as *Exhibit A*, the true nature of the "insurance" for which payment was demanded. Plaintiff had no knowledge of the truth and believed that the insurance procured was simply insurance against loss of or damage to the collateral until 1993. Accordingly, the statute of limitations is tolled with respect to the filing of a collection action against plaintiff in which unauthorized amounts were added to the balance allegedly due.

16. Defendants continued to pursue their demands for payment of the unauthorized insurance by plaintiff until a date within one year of the filing of this action.

DAMAGES SUFFERED

17. The premiums charged in each case amount to $2,000 to $4,000. In addition, interest is charged on the premiums.

18. As a result of defendants' demand for payment, plaintiff has suffered mental anguish and injury to her credit.

VIOLATIONS COMPLAINED OF

19. Defendants violated the FDCPA in the following respects by sending letters, such as *Exhibit A*, demanding paymant for the unauthorized insurance and filing collection actions demanding payment for the unauthorized insurance:

a. Defendants violated 15 U.S.C. §1692f, which prohibits "unfair or unconscionable means to collect or attempt to collect any debt," and defines "unfair or unconscionable means" to include adding amounts to the principal obligation "unless such amount is expressly authorized by the agreement creating the debt or permitted by law."

b. Defendants violated 15 U.S.C. §1692e, which prohibits "any false, deceptive or misleading representation or means in connection with the collection of any debt," including "[t]he false representation of . . . the character . . . of any debt," and "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt."

WHEREFORE, plaintiff requests that the Court grant the following relief in her favor and against defendants:

c. The maximum amount of statutory damages provided under 15 U.S.C. §1692k.

d. Appropriate actual damages.

e. Attorney's fees, litigation expenses and costs.

f. Such other and further relief as is appropriate.

/s/ Daniel A. Edelman

Daniel A. Edelman
Cathleen M. Combs
Tara G. Redmond
J. Eric Vander Arend
EDELMAN & COMBS
135 S. LaSalle Street, Suite 1006
Chicago, Illinois 60603
(312) 739-4200
(312) 739-4203 (DAE)
(312) 739-4205 (CMC)
(312) 739-4208 (TGR)
(312) 739-4210 (JEVA)
(312) 419-0379 (FAX)

JURY DEMAND

Plaintiff demands trial by jury.

/s/ Daniel A. Edelman

EXHIBIT A

Please refer to our File No. 238719

July 9, 1992

Attorney Steven Morton
Ste. 563, 221 N. LaSalle Street
Chicago, IL 60601

RE: Gainer Bank vs. Darlene Jenkins
89M1-147179

Dear Mr. Morton:

This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:

1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance add the price to the contract balance and shall be payable at the then annual percentage rate in effect.

2. This contractual default and failure to keep the vehicle properly insured happen . . four occasions. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time—November 19, 1987 through April 11, 1991 and paid therefore the amount of $4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled and there was a return refund premium of $347.00 which was properly applied to the account.

3. I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate $3,000.00 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.

This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

If you have questions or need additional information, please be in contact with me.

Very truly yours,

/s/ George W. Heintz
Merrillville Office
Member of Indiana & Illinois Bars

GWH/dk

Enclosure

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

DARLENE JENKINS, Plaintiff,	)	93 C 1332
v.	)	Judge Marovich
GEORGE W. HEINTZ; and BOWMAN, HEINTZ, BOSCIA & MCPHEE, Defendants.	)	

DEFENDANT'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Defendants, GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & MCPHEE ("Bowman"), by and through their attorneys, George W. Spellmire and David M. Schultz, respectfully move this court pursuant to Federal Rule of Civil Procedure 12(b) (6) to dismiss plaintiff's Amended Complaint, and in support thereof, state as follows:

I. *INTRODUCTION*

The court accepts only well pleaded facts as true when deciding a 12(b)(6) Motion to Dismiss. *Mitchell v. Archibald & Kendall, Inc.*, 573 F.2d 429, 432 (7th Cir. 1978). The court does not accept legal conclusions that are alleged or that may be drawn from the pleaded facts. *Id.* In this case, plaintiff attached a letter to the Complaint and to a great extent this cause of action is based on the letter. Exhibits included by reference become a part of the Complaint for all purposes pursuant to Federal Rule

of Civil Procedure 10(c) and can properly be considered by the court deciding a Motion to Dismiss.

The facts necessary to grant this Motion to Dismiss are few and are specifically pled in the Complaint. Bowman is a law firm and it was retained and file a lawsuit to recover a debt. During the pendency of the lawsuit, settlement discussions were conducted. Bowman sent a letter to plaintiff's counsel in furtherance of settlement discussions. Plaintiff now contends that the letter violated the Fair Debt Collection Practices Act ("FDCPA") because a portion of the debt owed to Bowman's client was not allowed under a certain contract. However, filing a lawsuit and pursuing settlement discussions involve purely legal activities. Therefore, the FDCPA is inapplicable to Bowman's activities and a Complaint based on the FDCPA fails to state a cause of action as a matter of law. *Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992); *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990); *Firemen's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S. 2d 950 (1991).

II. *STATEMENT OF FACTS*

Gainer Bank retained Bowman to file a lawsuit against Ms. Jenkins to recover a debt. (Comp. ¶ 22). The Complaint was filed more than one year prior to the filing of this lawsuit. (Compl. ¶ 23). It was based on plaintiff's failure to pay the amount owed under a contract relating to her purchase of an automobile. (Compl. ¶ 21, 22). Under the terms of the retail installment contract relating to the automobile purchase, Gainer Bank had a right to obtain insurance to cover loss or damage to the collateral if the plaintiff did not provide evidence of proper insurance

coverage. (Compl. ¶¶ 13, 14). The contract also provided that premiums incurred by the bank for such insurance could be added to the contract balance payable by plaintiff. (Compl. ¶ 14). Gainer Bank did obtain insurance for plaintiff. (Compl. ¶¶ 13, 14, 17 and Exhibit "A") When plaintiff failed to make payments under the installment contract, Bowman was retained to file a lawsuit to collect the amounts owed. (Compl. ¶ 22).

During Bowman's representation of Gainer in the litigation, it wrote to plaintiff's attorney on July 9, 1992. (Compl. Exhibit "A") The letter communicated information plaintiff's counsel requested in furtherance of settlement discussion. (Compl. Exhibit "A"). However, plaintiff now claims that the insurance Gainer purchased included additional coverages that went beyond the contractual terms. (Compl. ¶ 15 and 16).

Plaintiff contends in this action that Bowman had actual knowledge in 1992 that the insurance coverage included amounts not allowed under the contract. (Compl. ¶ 18)[1] In order to establish an alleged violation of the FDCPA, plaintiff claims that the settlement letter of July 9, 1992 was an "unfair and unconscionable" attempt to collect a debt and was a "false, deceptive or misleading representation" in connection with the collection of a debt. (Compl. ¶ 19).

[1] The allegations in paragraph 18 do not relate to the *Gainer Bank v. Jenkins* case, but to a wholly separate complaint filed by Bowman in 1992. This distinction is important so that the court does not conclude that the *Gainer v. Jenkins* case was filed in April 1992 and within the FDCPA one year Statute of Limitation. 15 U.S.C. §1692k.

III. *DEFENDANTS ACTIONS DO NOT CONSTITUTE AN ACTIONABLE CLAIM UNDER THE FAIR DEBT COLLECTION PRACTICES ACT*

Until 1986, any action by an attorney in connection with the collection of a debt was excluded from the FDCPA. The attorney exemption was removed in 1986. The amendment that deleted the attorney exemption was meant to close a serious loophole that allowed attorneys engaged in traditional debt collection activities to avoid the protections of the FDCPA merely because they had obtained a law degree. *Green v. Hocking*, 792 F. Supp. 1064, 1065 (E.D. Mich. 1992). The purpose of the amendment, however, was not to make the FDCPA automatically applicable to all attorney functions connected in whatever way to the collection of a debt. The FDCPA regulates traditional debt collection activities, not purely law related activities done in connection with the recoupment of a debt. This interpretation of the FDCPA is consistent with the majority of a case law addressing the issue, the legislative history to the 1986 amendment and the interpretations placed on the amendment by the Federal Trade Commission.

In this case, Bowman was involved in purely law related activities, as distinguished from typical collection activities. In a similar scenario, the defendant/attorney in *Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992), was retained to file a Complaint on behalf of a creditor. The attorney was subsequently sued pursuant to the FDCPA for falsely representing in the Complaint the amounts of the debt. The court noted that a literal reading of the definition of a "debt collector" may suggest that an attorney who files a Complaint on behalf of a creditor is a debt collector. *Id.* at 1065. However, it reasoned that a literal application of the definition would produce a

result demonstrably at odds with Congress' intent in enacting the amendment, and thus the seemingly strict language of the statute was not controlling. *Id.* The court then held that an attorney who regularly filed legal proceedings to collect a debt does not fall within the FDCPA because the attorney is involved in a purely legal task. *Id.* at 1066.

The same conclusion was reached in *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139 (S.D. N.Y. 1990). In reaching the conclusion that the FDCPA did not apply to attorneys who filed suit to collect a client's debt, the court reasoned that the 1986 amendment was meant to make the Act applicable to attorneys engaged in activities traditionally carried out by debt collectors. *Id* at 1141. Unlike the activities of a debt collector, the filing of a lawsuit[2] and pursuing subsequent settlement discussions are legal activities.

In *Firemen's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D. N.Y. 1990), the plaintiffs retained a law firm to file an action to compel defendants to comply with the

[2] The *Jenkins* complaint is based on Complaint Exhibit A, though there are also references to the *Gainer* complaint being a violation of the FDCPA. (Compl. ¶¶ 23, 29). However, the *Gainer* complaint was filed more than one year before this lawsuit. (Compl. ¶ 23). The FDCPA requires that a action for violation of the Act must brought within one year of the violation. 15 U.S.C. §1692k(d). An action based on the complaint thus is untimely. Moreover, filing the complaint is a strictly legal activity and therefore the FDCPA does not apply.

Plaintiff's allegations that fraudulent concealment should toll the statute of limitations is unfounded. A jurisdictional requirement for an action under the FDCPA is that the lawsuit be filed within one year of the violation. When a statute creates a new right and a statute of limitations, the Doctrine of Fraudulent Concealment is inapplicable. *United States ex rel. Nitkey v. Dawes*, 151 F.2d 639, 644 (7th Cir. 1945); 51 Am. Jur.2d Limitation of Actions §151.

terms of an indemnification agreement. In that lawsuit, defendants claimed that the attorney violated the FDCPA. The court, however, held that the Act does not reach the law firm's representation of its client in the legal proceeding because the firm was acting as legal counsel and not performing traditional debt collection services. *Id.* at 1143. See also *Concord Assets Finance Corn. v. Radebaugh*, 568 N.Y.S. 2d 950 (1991); *Catherman v. First State Bank of Smithville*, 796 S.W. 2d 299 (Tx. Ct. App. 1990) (court upheld a finding that defendants/attorneys were not debt collectors within the Act).

This interpretation of the FDCPA is consistent with the legislative history of the 1986 amendment. The amendment was designed to regulate activities such as: late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debt, frequent and repeated calls to consumers, disclosure of consumer's debt to third parties, threats of legal actions on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where this is little likelihood that such action will be taken. See H. Rpt. 99-405, 99th Cong., 2d Sess. 1-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 1755. The amendment was necessary because it was estimated that in 1985 approximately 5,000 attorneys were engaged in debt collection, compared to approximately 4,500 "lay" debt collection firms, and the attorneys were exempted from the FDCPA. *Firemen's Insurance Co. v. Keating*, 753 F. Supp 1137, 1142 (S.D.N.Y. 1990).

The sponsor of the amendment was Representative Annunzio and he stated that "removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys. It will not prevent them from repre-

senting interests of their clients." 131 Cong. Rep. 33, 584 (1985). After the enactment of the amendment, Representative Annunzio stated:

> "Only collection activities, not legal activities, are covered by the Act. . . . The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it did not prevent creditors, through their attorneys, from pursuing any legal remedies available to them." 132 Cong. Rep. H 10031 (1986).

See also *Green v. Hocking,* 792 F. Supp. 1064, 1065-66 (E.D. Mich. 1992); *Fireman's Insurance Co. v. Keating,* 753 F. Supp. 1137, 1142 (S.D.N.Y. 1990).

Of course, it is unnecessary to review legislative history if the statute's language is clear and unambiguous. *United States v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 241, 109 S. Ct. 1029, 1030, 103 L. Ed. 2d 290 (1989). It arguably is not clear whether the term "debt collector" in the FDCPA applies to attorneys involved in litigation proceedings. The majority of the cases addressing this issue have held that the Act does not apply in such circumstance, and in reaching their conclusion have reviewed the legislative history. Nevertheless, there are a few opinions that have held the Act applicable to attorneys in litigation matters, although this clearly is not the majority view. This "split" in authority supports the view that legislative history should be reviewed.

The interpretation of the Act that attorneys involved in legal proceedings for their clients do not fall within the coverage of the Act is also consistent with the Federal Trade Commission's ("FTC") view of the issue. The FTC is the federal agency charged with administration of the Act. If a statute is silent or ambiguous with respect to

an issue, the court must defer to a reasonable construction of the statute made by the implementing agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel,* 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2781-83, 81 L. Ed. 2d 694 (1984). The FTC's interpretation of the Act is that attorneys or law firms that engage in traditional debt collection activities are covered by the FDCPA, but those whose practice is limited to legal activities are not covered. See Statements of General Policy or Interpretation; Staff Commentary On the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 50,100 (1988). See also *Noonan, Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices In Consumer Financial Service,* 43 Bus. Law. 1069, 1075 (1988) (the FTC's interpretation of the Act is that attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector); *Dugan,* FTC activities, 44 Bus. Law. 1419, 1424 (1989).

The cases that have held the Act applicable to an attorney are distinguishable. The attorney in the majority of those cases was involved in debt collection activities, such as sending collection letters to debtors, and were not involved in legal proceedings. For instance, in *Crossley v. Lieberman,* 868 F.2d 566 (10th Cir. 1989), the FDCPA was applied to an attorney who sent collection letters to debtors, which violated the FDCPA. See also *Dorsey v. Morgan,* 760 F. Supp. 509 (D. Md. 1991) (an attorney who sends collection letters may be a "debt collector" within the meaning of the Act.); *Grizano v. Harrison,* 763 F. Supp. 1269 (D. N.J. 1991) (Defendant/attorney was hired by a creditor to send debt collection notices to debtors); *Cacace v. Lucas,* 775 F. Supp. 502 (D. Conn. 1990) (FDCPA may apply to an attorney retained by a credit union who sends collection letters that violate the

FDCPA); but see also *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) (an attorney involved in litigation for a creditor may be a debt collector under the FDCPA); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (an attorney who pursues abusive legal activities may fall within the coverage of the FDCPA).

In this case, Bowman was retained to pursue legal activities. He filed a lawsuit and during the pendency of that case conducted settlement discussions with opposing counsel. In furtherance of the discussions a letter was sent which simply provided that a debt was owed, that its client was trying to collect the debt, and that perhaps a reasonable solution to the situation could be obtained. (Compl. Exhibit "A" ("This is a letter to follow up our recent conversation in an attempt to amicably resolve this matter. . . [H]opefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution."). This July 9, 1992 letter is the basis for this Fair Debt Collection Practices Act cause of action. However, the FDCPA surely is not designed to regulate this type of legal activity.

IV. *THERE ARE ALREADY SUFFICIENT RULES THAT REGULATE THE ACTIVITIES OF LAWYERS INVOLVED IN LITIGATION*

An interpretation that the Act regulates conduct of attorneys involved in litigation is unnecessary and inconsistent with existing rules that regulate attorney conduct. The United States Congress and the United States Supreme Court has already established Federal Rule Civil Procedure 11 to regulate the litigation-related conduct of attorneys and parties. The rule requires that (1) attorneys must make a "reasonable inquiry", (2) any pleading, motion, or paper submitted by an attorney must be well-grounded in fact, or (3) warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and (4) any pleadings, motions or papers must not be submitted for an improper purpose. Illinois has adopted a similar rule. Ill. Rev. Stat. 1993, ch. 110, R. 137. Moreover, the United District Court for the Northern District of Illinois and the Illinois Supreme Court have both adopted Rules of Professional Conduct. These rules regulate the conduct of attorneys involved in lawyer-related activities.

If the allegations in plaintiff's Complaint are true, actions under these lawyer-regulating Rules may apply. However, the FDCPA has not been, and should not be, placed as an additional layer over these Rules in order to regulate lawyer conduct that is separate from conduct generally associated with debt collectors. See *Green v. Hocking*, 792 F. Supp. 1064, 1066, n.4 (E.D. Mich. 1992) ("irrespective of Congress' intent, bringing attorneys who perform traditional legal services within the scope of the FDCPA does not seem warranted given the numerous codes, including the Michigan Rules of Professional Conduct, . . . , that regulate the conduct of attorneys. Subjecting an attorney to the extrajudicial discipline of an action under the FDCPA may also raise a separation of powers question since attorneys in courts have been traditionally considered as officers of the court.").

V. *CONCLUSION*

The facts pled in this Complaint establish that no cause of action can be brought against these defendants for violation of the Fair Debt Collection Practices Act. This Complaint is based in large part on the attempts to recover a debt as expressed in the July 9, 1992 letter.

However, it is undisputed that at this time defendants were involved in litigation-related activities and not those typical of a debt collector. Accordingly, the Act does not apply in this instance and no cause of action is stated.

WHEREFORE, defendants respectfully request that this court dismiss with prejudice the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

Respectfully submitted,

HINSHAW & CULBERTSON

By: /s/ David M. Schultz
Attorney for defendant
George W. Heintz and
Bowman, Heintz, Boscia
& McPhee

George W. Spellmire
David M. Schultz
HINSHAW & CULBERTSON
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
Ph: (312) 704-3000
Firm No. 90384

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDGMENT IN A CIVIL CASE

DARLENE JENKINS

v. Case Number 93 C 1332

GEORGE W. HEINTZ et al

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff take nothing and the case is dismissed.

Date: July 26, 1993

/s/ H. Stuart Cunningham
Clerk

/s/ Frances D'Andrea
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

DARLENE JENKINS,	)	
	)	
Plaintiff,	)	93 C 1332
v.	)	
	)	Judge
GEORGE W. HEINTZ; and	)	George M. Marovich
BOWMAN, HEINTZ, BOSCIA	)	
& MCPHEE,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Darlene Jenkins ("Jenkins") filed suit against Defendants George W. Heintz and Bowman, Heintz, Boscia & McPhee ("Bowman") alleging that Bowman violated the Fair Debt Collection Practices Act, 15 U.S.C. §1692 ("FDCPA"). Defendants are attorneys who were retained by a creditor to pursue litigation against a debtor who had defaulted on a loan. Bowman sent a letter to Jenkins' attorney in an effort to settle the pending lawsuit. Jenkins alleges that this letter constituted a violation of §§1692(e) and 1692(f) in that certain insurance charges were allegedly added to the debt which were not payable by the debtors. Defendants move to dismiss the complaint on the grounds that Bowman's filing of the suit and sending the settlement letter were purely legal activities and therefore the FDCPA is inapplicable. For the following reasons, we grant the motion to dismiss.

BACKGROUND

Defendant Heintz is an attorney and a partner in the Bowman law firm. Gainer Bank is a client of the Bowman

law firm and has a large number of customers who have signed retail installment contracts for the purchase of motor vehicles.

On July 9, 1992, Heintz wrote a letter to Darlene Jenkins detailing her indebtedness to his client, Gainer Bank, including a debt for premiums for insurance charged to Jenkins as part of her installment contract. This indebtedness arose from Jenkins' default on an automobile installment contract. Gainer Bank's contracts provide that the buyer shall keep the vehicle insured against loss or damage, and if the buyer fails to do so, the creditor (Bank) can purchase the necessary insurance to cover the vehicle. The pertinent language provides:

> . . . if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, [and that] if the Buyer does not pay the taxes on the collateral, [or] keep it insured . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins claims that Defendants violated the FDCPA by sending letters demanding payment for the allegedly unauthorized insurance and filing collections actions demanding payment for allegedly unauthorized insurance. The Heintz letter outlines Jenkins' indebtedness and ends with the following language:

> I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately 13 payments of $236.71 were due or an additional approximate $3000.00 was due. $3000.00 added to the $4,173.00 for insurance along with the late charges

> on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession. This matter is next up for status on July 15, 1992 and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution.

Plaintiff contends that this letter violated the FDCPA because a portion of the debt owed Bowman's client was allegedly not allowed under the contract. Defendant claims that this complaint should be dismissed because the filing of the lawsuit and the letter pursuing settlement discussions are purely legal activities and therefore the FDCPA does not apply.

DISCUSSION

When reviewing a motion to dismiss we must assume the truth of all well-pleaded factual allegations and make all possible inferences in favor of the plaintiff. *See Janowsky v. United States*, 913 F.2d 393, 395 (7th Cir. 1990); *Rogers v. United States*, 902 F.2d 1268, 1269 (7th Cir. 1990). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Gorski v. Troy*, 929 F.2d 1183, 1186 (quoting *Conley v. Gibson*, U.S. 41, 45-6 (1957)).

The FDCPA was originally designed to prevent abusive actions by debt collectors. In keeping with this goal it outlines certain practices from which debt collectors must refrain. As it was originally drafted, the Act specifically excluded attorneys within the definition of "debt collectors" under 15 U.S.C.A. §1692a(6). However, in 1986 Congress amended the FDCPA to delete the attorney exclusion. Pub. L. 99-361, 100 Stat. 768. Now, the language

of the Act includes attorneys who represent creditors in debt collection actions.

Various courts have addressed the issue of whether an attorney acts as a debt collector in an array of fact patterns. A number of courts have held that the FDCPA applies to attorneys who collect debts on a regular basis. For instance, the Fourth Circuit has found that attorneys who regularly collect debts fall within the guidelines of the FDCPA. *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

In *Jones*, an attorney who was retained by banks to represent bank card divisions in lawsuits based on delinquent credit card accounts was held to be a debt collector under the FDCPA. *Id.* at 316. In coming to this conclusion, the Fourth Circuit stressed the fact that at least 70% of the attorney's legal fees were generated from the collection of debts. The court held that the attorney in *Jones* not only collected debts on a regular basis but also that the "principal purpose" of his job was to collect debts. *Id.*

On the opposite end of the spectrum exist the courts that have examined the attorney's role and have held that an attorney who regularly files legal actions for the purpose of collecting debts is not a debt collector if his primary role in collecting those debts is purely of a legal nature. *See, e.g. Green v. Hocking*, 792 F. Supp. 1064 (E.D. Mich. 1992); *National Union Fire Insurance Co. v. Hartel*, 741 F. Supp. 1139, 1140 (S.D.N.Y. 1990); *Fireman's Insurance Co. v. Keating*, 753 F. Supp. 1137 (S.D. N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S.2d 950 (1991).

We do not find that these authorities conflict with each other. The primary focus of the courts in ascertaining whether the FDCPA applies to attorneys is whether the

attorney's principal role is to collect debts. This question is not answered within a vacuum. Instead, the courts take into account a variety of factors including the percentage of debt collection compared to other legal work performed by the firm, the circumstances of the debtor in relation to the attorney, and the behavior alleged to have violated the Act.

In the case at hand, we find that the letter sent by Bowman to Jenkins does not rise to the level of a "dunning" letter as proscribed by the Act. The letter, instead, appears to set forth a rational, and calm approach to remedying a conflict between the parties. To classify this missive as the type of threatening and abusive practice which violates this Act would not correspond with the purpose behind the enactment of the FDCPA.

Legislative history illuminates the purpose of this Act. The amendment in 1986 was designed to regulate activities such as late night telephone calls to consumers, calls to consumers' employers, frequent and repeated calls, threats of legal action on relatively small amounts of debt, simulation of legal process, harassment, threats of seizure of property and the disclosure of consumers' debt to third parties. *See* H. Rpt. 99-405, 99th Cong., 2d Sess. 1-7, reprinted in 1986 U.S. Code Cong. & Admin. News at 1755. A central purpose of the FDCPA is to ensure that the consumer pay the amount that is owed and is not dunned for amounts which he does not owe. Thus, §1692 precludes the false representation of any amount of a debt. The Official Staff Commentary states:

> Attorneys or law firms that engage in the traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but not those whose practice is limited to legal activities are not covered.

Commentary to §803(6)-2, 53 Fed. Reg. at 50100. Representative Annunzio summed up the purpose after the enactment of the Act by saying:

> Only collection activities, not legal activities, are covered by the Act. . . . The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it did not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.

132 Cong. Rep. H 10031 (1986).

It is evident from the language of the statute and the case law in this area that the FDCPA covers actions by attorneys who engage in the typical debt collecting activities proscribed by the Act. However, it is also evident that not all actions engaged in by attorneys who collect debts violate the Act. The letter before us is a level-headed and reasonable request to settle a conflict between two parties who are in disagreement regarding a debt. It is not threatening, harassing or intimidating. It was not sent to the debtor directly, but rather, to the debtor's attorney. It was not one of a long line of abusive practices, but rather a single plea for settlement purposes. We do not find that this attorney action falls within the meaning of the FDCPA.

We therefore dismiss the complaint for failure to state a claim upon which relief can be granted.

ENTER:

/s/ George M. Marovich
United States District Judge

DATED: July 26, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-2861

DARLENE JENKINS,

Plaintiff-Appellant,

v.

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & MCPHEE,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 C 1332—**George M. Marovich**, *Judge*.

ARGUED JANUARY 4, 1994—DECIDED MAY 27, 1994

Before FAIRCHILD, MANION, and KANNE, *Circuit Judges*.

MANION, *Circuit Judge*. Darlene Jenkins sued George W. Heintz and his law firm, Bowman, Heintz, Boscia & McPhee, for violating the Fair Debt Collection Practices Act, 15 U.S.C. §1601 *et seq.* Heintz and the law firm filed a motion to dismiss, arguing that attorneys who file suit to collect debts are not covered by the Act. The district court agreed and dismissed the lawsuit. Jenkins appeals. We reverse and remand.

I. Facts

Darlene Jenkins borrowed money from Gainer Bank to purchase a car. The installment contract between the bank and Jenkins required that she keep insurance on the car until she made her last payment. If she did not keep insurance, the installment contract allowed the bank to purchase insurance for the car, and then to charge Jenkins for the cost of the insurance. Specifically, the installment contract provided:

> if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Jenkins defaulted on her loan. She also stopped buying insurance for the car. The bank then purchased insurance, and hired an attorney, George W. Heintz, and his law firm, Bowman, Heintz, Boscia & McPhee, to recover the remaining installment payments and the cost of the insurance. The attorneys sued Jenkins on behalf of the bank, demanding the installment payments and a $4173.00 insurance charge, and then attempted to settle the matter out of court.

Jenkins took issue with the $4173.00 insurance demand. She had reason to believe that the bank did not buy simple damage and loss insurance for the car, but instead purchased a financial protection policy to insure against the possibility that she might default on the loan. She figured that she had no obligation to reimburse the bank for that type of insurance; she was only required to reimburse the bank if it purchased damage and loss insurance for the car.

Jenkins filed suit against Heintz and his law firm, alleging that their attempts to pass the unauthorized insurance costs on to her violated the Fair Debt Collection Practices

Act. Her legal theory was two-fold. First, she claimed that because the insurance charge was not authorized by the installment contract, that the attorneys violated §1692f of the Act, by adding an unauthorized amount onto the debt. Second, she claimed that the attorneys' attempt to sneak the insurance charge onto her bill amounted to a "false representation or deceptive means to collect any debt" in violation of §1692e of the Act.

Heintz and his law firm moved to dismiss. They asserted that Congress simply could not have intended to regulate normal legal proceedings under the auspices of the Act. The district court agreed, and dismissed the case. Jenkins appeals. We must determine whether the broad purview of the Act covers the type of attorney conduct described in Jenkins' complaint.

II. Analysis

We review the district court's dismissal for failure to state a claim *de novo*. *Midwest Grinding Co., Inc. v. Spitz*, 976 F.2d 1016, 1019 (7th Cir. 1992). In conducting our review, we accept all material allegations made in the complaint as true, and we draw all reasonable inferences from the allegations in the plaintiff's favor. *Scott v. O'Grady*, 975 F.2d 366, 368 (7th Cir. 1992). We will affirm the court's dismissal if "it appears beyond doubt that [the plaintiff] can prove no set of facts in support of this claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Congress enacted the Fair Debt Collection Practices Act in 1977, "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. §1692(e). The Act targeted common abusive debt collection practices, like late-night phone calls, §1692c(a)(1), embarrassing communications through third parties, §1692c(b), harassment, §1692d, false and mis-

leading representations by the debt collector, §1692e, and assorted other practices, §§1692f-j. Obviously, Congress did not intend to eliminate all debt collection practices, only those which it considered unfair. In its original form at least, the Act stopped short of regulating certain methods of debt collection. For instance, legal proceedings did not fall under the purview of the Act. Congress accomplished this by explicitly exempting from the definition of "debt collector," "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." §1692a(6)(F).

The attorney exemption meant that attorneys could go about the legitimate business of debt collection without the fear of being sued. But it also made attorneys an unregulated class of debt collectors. Some apparently abused this loophole and engaged in abusive debt collection practices with impunity. As the Sixth Circuit recently noted, "[a]ttorneys were advertising to creditors that they could do with impunity what other collectors could no longer do: 'late-night telephone calls to consumers, calls to consumers' employers concerning the consumer's debts,' and 'disclosure of consumer's debt to third parties.'" *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993). In 1986, Congress acted to close this loophole; it amended the Act to remove the attorney exemption.

This case presents the question whether, in the wake of the 1986 amendment, attorneys acting in the course of litigation are now included within the scope of the Act. The district court determined that even in its revised form, the Act was simply not meant to regulate attorneys acting in the course of litigation. Our *de novo* review of the district court's interpretation of the statute's meaning requires that we look first to the statute's language. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989). When the statute's language is clear, the text controls. *Estate of Cowant v. Nicklos Drilling Co.*, ____ U.S. ____, 112 S.Ct. 2589, 2594 (1992).

The Act regulates the conduct of any "debt collector." §1692a(6). The Act defines "debt collector" as "any per-

son who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another." §1692a(6). Nothing in this definition hints that attorneys in the course of litigation should be excluded. Therefore, if a plaintiff can demonstrate that an attorney fits within the rubrics of the statutory definition of "debt collector," then that attorney's conduct is regulated.

Here, Jenkins alleged in her complaint that Heintz and his law firm were "regularly engaged for profit in the collection of debts allegedly owed by consumers. Each is a 'debt collector' as defined by the [Act §1692a(6)]." The proceedings have not advanced beyond the motion to dismiss stage. Therefore, we are required to accept this allegation as true. *Scott*, 975 F.2d at 368. If this allegation is true, Heintz and his law firm fall within the statutory definition of "debt collector" and the Act regulates their conduct.

In an attempt to escape this definition, Heintz and his law firm make an appeal to common sense. They argue that the Act was never meant to reach reasonable debt collection practices, such as litigation. It was only meant to cover the seamier practices of debt collection, such as late-night phone calls and other abusive conduct. Basically, they argue—with some indignation—that they are lawyers and not mere debt collectors. But the Act makes no such distinction; it has not since the 1986 amendment eliminating the attorney exemption. Under the Act as presently written, lawyers can be debt collectors, as long as they engage in the business of debt collection.

This view comports with the Fourth Circuit's decision in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992). There the court faced the same question: whether a lawyer in the course of litigation may be considered a debt collector under the Act. The court interpreted the plain meaning of the statute, and concluded that a lawyer may be con-

sidered a debt collector, as long as he meets the statutory definition. The court was not persuaded by the lawyer's argument that there was some obvious distinction between the practice of law and debt collection: "[w]e do not accept [the lawyer's] argument that he was engaged in the practice of law, not the collection of debts. We find this to be an artificial distinction. No matter what name is applied to [the lawyer's] activities, it is clear that the 'principal purpose' of his work was the collection of debt." *Id.* at 316.

The Sixth Circuit has reached a contrary result. In *Green*, 9 F.3d 18, the court considered whether a lawyer, by filing a complaint, qualified as a debt collector under the Act. The court concluded that "[a]n examination of the [Act] in context reveals that it was not intended to govern attorneys engaged solely in the practice of law. A contrary result would produce absurd outcomes." *Green*, 9 F.3d at 21. After demonstrating how literal enforcement could interfere with normal litigation, the court proceeded to rely on legislative history to support its position that Congress never intended the Act to reach litigation activities.

As the Sixth Circuit noted, there are conceivable problems with regulating attorneys in their debt collection efforts. Unlike the Sixth Circuit, however, our analysis of the statute ends with its language; we do not reach the legislative history. It appears that by removing the attorney exemption without otherwise adjusting the statute, Congress—wittingly or not—proscribed even certain litigation-related debt collection activities. There may be abundant reasons why Congress should not regulate litigation aimed at collecting debts. But in drafting a broad statute, Congress entered all areas inhabited by debt collectors, even litigation. We must faithfully apply the law as Congress drafted it. We should not disregard plain statutory language in order to impose on the statute what we may consider a more reasonable meaning. *See Matter Witkowski*, 16 F.3d 739, 745 (7th Cir. 1994) ("Even if there were some justification for concern, courts cannot re-write statutes.").

So the Act reaches lawyers engaged in litigation. But in order for the lawyers to be subject to liability under the Act, the litigation must entail some proscribed debt collection activity. Jenkins alleged that Heintz and his law firm engaged in two proscribed activities: adding an unauthorized charge to the debt, in violation of §1692f, and using deceptive means to collect a debt, in violation of §1692e.

Section 1692f provides in part:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

The installment contract authorized the bank to purchase loss or damage insurance for the car if Jenkins failed to. It did not authorize the bank to purchase a financial protection policy to insure against default, and then to pass that cost of that policy onto Jenkins. If, as Jenkins alleged in her complaint, the attorneys charged her for the costs of a financial protection policy, the charge would not have been authorized. At the motion to dismiss stage we accept Jenkins' allegation that the attorneys charged her for a financial protection policy rather than for simple car insurance. Heintz and his law firm do not address this point in their brief. So, without more, we must conclude that Jenkins states a claim under §1692f(1).

Jenkins next claims that the unauthorized charge was false, deceptive and misleading. Section 1692e provides in part that "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." Again, if the facts are as Jenkins contends—that Heintz and his law firm knew the insurance charge was unauthorized, but tried to pass

it off anyway—then she states a claim. Because we are required to accept her allegations in this respect as true, we conclude that she does state a claim. Knowingly making unauthorized charges in connection with debt collection is at least deceptive and misleading.

III. Conclusion

In 1977, Congress wielded the weapon of consumer legislation against some obvious targets: late night phone calls, harassment and other abuses common in debt collection. But when it removed the attorney exemption nine years later, it expanded the statute's impact to include some attorneys engaged in debt collection litigation. We are not authorized to second-guess Congress by reading out of the statute certain intrusions we could consider unwarranted. Nor are we allowed to reconstruct the statute's plain meaning by reference to legislative history. We may only apply the law as Congress drafted it. We therefore reverse the district court's determination that the Act does not apply to attorneys in the course of litigation to collect debts. There is no longer an attorney exemption in the Act, and we cannot create one by judicial fiat. We also reverse the district court's determination that the attorneys' actions were not of the type proscribed by the Act. At the motion to dismiss stage, we accept the allegations made in the complaint as true. If Heintz and his law firm acted in the manner Jenkins alleged, then they fall within the broad scope of the Act. We remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

(4)

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF ON THE MERITS OF PETITIONERS GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Attorneys for Petitioners

HINSHAW & CULBERTSON
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

29 pp

QUESTION PRESENTED

Whether an attorney engaged solely to prosecute litigation against a consumer is a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6)).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF ON THE MERITS OF PETITIONERS GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE

OPINIONS

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 25 F.3d 536, and is reproduced in the Joint Appendix filed herewith ("J.A.") at page 32. The order of the United States District Court for the Northern District of Illinois was not published. It is reproduced at J.A. 26.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1994. J.A. 32. Petitioners filed their petition for writ of certiorari on August 25, 1994. On October 31, 1994, this Court granted the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Fair Debt Collection Practices Act § 1692a(6): 15 U.S.C. § 1692a(6). Definitions

> (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (f) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include. . .

* * *

Fair Debt Collection Practices Act § 1692e(2): 15 U.S.C. § 1692e(2). False or misleading representations:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of the section:

> (2) The false representation of—
>
> (A) The character, amount, or legal status of any debt; or
>
> (B) Any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

Fair Debt Collection Practices Act § 1692f: 15 U.S.C. § 1692f. Unfair practices

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of the section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

STATEMENT OF THE CASE

Gainer Bank of Gary, Indiana lent money to Jenkins for the purchase of an automobile. J.A. 7. Pursuant to the installment contract, Jenkins agreed to maintain insurance on the car until she made the last payment. If Jenkins did not keep insurance, the bank was allowed to purchase insurance for the car. The contract provided that premiums incurred by the bank for such insurance could be added to the contract balance payable by Jenkins. J.A. 7.

Jenkins stopped buying insurance for the car and making payments on the car loan. The bank purchased insurance for the car. J.A. 12. The bank then hired George W. Heintz and Bowman, Heintz, Boscia & McPhee ("Heintz") to file a lawsuit to recover the remaining installment payments and the cost of the insurance. J.A. 7-8.

Heintz filed a lawsuit on behalf of the bank against Jenkins. J.A. 8. Jenkins retained her own attorney. J.A. 12. On July 9, 1992, Heintz sent the following letter to Jenkins' attorney (J.A. 12):

Attorney Steven Morton
Suite 563, 221 N. LaSalle Street
Chicago, IL 60601

Re: Gainer Bank vs. Darlene Jenkins
89 M1-147179

Dear Mr. Morton:

This is a letter to follow up our recent telephone conversation in an attempt to amicably resolve this matter. I am enclosing the following documents and advising as follows:

1. Copy of the retail installment contract whereon I have highlighted on the reverse side revisions eight and twelve regarding having Darlene Jenkins keep the vehicle fully insured at all times and allowing the creditor, if the vehicle is not insured, to purchase such insurance, add the price to the contract balance and shall be payable at the then annual percentage rate in effect.
2. This contractual default and failure to keep the vehicle properly insured happen . . . four occasions [sic]. For your reference, I enclose herewith insurance information showing the Bank purchased insurance for periods of time—November 19, 1987 through April 11, 1991 and paid therefore the amount of $4173.00. This amount plus the accruing contractual interest was added to the contract balance. After the vehicle was repossessed and ultimately sold, the last policy so purchased was canceled [sic] and there was a return premium of $347.00 which was properly applied to the account.

3. I believe the parties have jointly focused on the fact that approximately 35 out of 48 payments on the contract were made although sporadic and delinquent. It would therefore indicate that approximately payments of $236.71 were due or an additional approximate $3,000 was due. $3,000.00 added to the $4,173.00 for insurance along with the late charges on the contract along with the interest which was accruing on all the monies advanced for insurance approximately $8,500.00 balance in effect at the time of repossession.

This matter is next up for status on July 15, 1992, and hopefully we can discuss it prior to or at the status conference to reach some type of amicable practical resolution. If you have any questions or need additional information, please be in contact with me.

/s/ George W. Heintz

Jenkins alleged that the bank did not buy only damage and loss insurance for the car, but also purchased a "financial protection" policy to insure against the possibility that she might default on the loan. J.A. 7. Jenkins alleged that the "financial protection" insurance is an unauthorized charge. J.A. 8-9.

Jenkins filed suit against Heintz. J.A. 6. She alleged that Heintz was a "debt collector" pursuant to the Fair Debt Collection Practices Act. J.A. 7. Jenkins alleged that the letter to her attorney violated the Act in two respects. First, she claimed that because a portion of the insurance charge was not authorized by the installment contract, Heintz violated 15 U.S.C. § 1692f by adding an unauthorized amount to the debt. Second, she alleged that Heintz' attempt to recover an unauthorized insurance charge amounted to a "false representation or deceptive means

to collect any debt" in violation of 15 U.S.C. § 1692e. J.A. 10.

Heintz filed a motion to dismiss the complaint under F.R.C.P. 12(b)(6). J.A. 14. He argued that an attorney engaged solely to prosecute litigation on behalf of a client/creditor was not a "debt collector" within the meaning of the Act. J.A. 17-22. Heintz supported his view with extensive references to the legislative history and administrative interpretations supporting this construction of the Act. J.A. 19-21. The district court granted the motion and dismissed the case with prejudice. J.A. 25-31.

The court of appeals reversed. J.A. 32. Relying upon the allegations in Jenkins' complaint that Heintz "regularly engaged for profit in the collection of debts," the court found that Heintz was a debt collector within the meaning of 15 U.S.C. § 1692a(6). J.A. 35-36. The court rejected the argument that Congress did not intend the Act to apply to attorneys engaged solely in the prosecution of litigation, finding that the broad statutory language "entered all areas inhabited by debt collectors, even litigation." J.A. 37. The court declined to address the legislative history and administrative interpretation of the Act, stating "our analysis ends with the [statutory] language." J.A. 37.

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act was never meant to apply to attorneys engaged solely to prosecute litigation on behalf of a creditor.

In its original version, the Act exempted attorneys from all provisions. Thus, Congress did not have to consider how the provisions might relate to attorneys engaged in consumer debt litigation. When the attorney exemption

was eliminated, attorneys became liable when they acted as "debt collectors," not as litigation attorneys.

The plain meaning of the term "debt collector" does not extend to attorneys engaged in consumer debt litigation. Thus, the court should refer to legislative history and administrative interpretation to divine the statute's meaning. Both the legislative history and administrative interpretation entirely support Heintz' position.

Because Congress only intended the Act's provisions to apply to persons engaged in true debt collection activity, application of the Act to attorneys engaged solely in litigation results in absurd and incongruous results.

ARGUMENT

ATTORNEYS ENGAGED SOLELY TO PROSECUTE CONSUMER DEBT LITIGATION ARE NOT "DEBT COLLECTORS" WITHIN THE MEANING OF THE FAIR DEBT COLLECTION PRACTICES ACT.

Congress enacted the Fair Debt Collection Practices Act ("Act") in 1977 "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrained from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). The Act identified common abusive debt collection practices, such as late-night telephone calls, (15 U.S.C. § 1692c(a)(1)), embarrassing communications through third parties, (15 U.S.C. § 1692c(b)), harassment, (15 U.S.C. § 1692d), and false and misleading representations by debt collectors (15 U.S.C. § 1692e).

As originally drafted, the Act specifically exempted attorneys from liability within the definition of "debt collec-

tor." 15 U.S.C. § 1692a(6)(f) (1977). The attorney exemption, however, allowed attorneys to perform all functions of a debt collector without the risk of violating the Act. In 1986, Congress amended the Act to delete the attorney exemption. This amendment closed the loophole that allowed attorneys engaged in the targeted, unsavory debt collection activities to avoid the protection of the Act merely because they had obtained a law degree. H.R. Rep. No. 405, reprinted in *U.S. Code, Cong. & Admin. News* at 1754.

The issue in this case arises because the 1986 amendment created a question not addressed by the Act: does an attorney like Heintz, who is engaged solely to prosecute consumer debt litigation, act as a "debt collector" when performing traditional litigation functions?

A. The Plain Language of the Definition of "Debt Collector" Does Not Include Attorneys Engaged in the Prosecution of Consumer Debt Litigation.

Whether the Act applies to attorneys involved in litigation activities turns on the definition of "debt collector." The starting point in this statutory construction is the plain language of the Act. *United States v. Hohri*, 482 U.S. 64, 69 (1987). The court need inquire no further when the statutory language is plain, and if nothing in the Act's structure and relationship to other statutes calls its meaning into question. *Amoco Production Company v. Village of Gambell, Alaska*, 480 U.S. 531, 552-553 (1987).

The Act defines "debt collector" as:

> Any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. . . 15 U.S.C. § 1692a(6).

The court of appeals found this language clearly applicable to attorneys involved in litigation. However, there is nothing in this definition which plainly suggests that an attorney who prosecutes litigation is "collecting" a debt. Nor does the definition address the types of things attorneys do when litigating disputed consumer debts.

The Act reflexively defines "debt collector" as someone who regularly engages in the collection of debts. This definition begs the question posed by this case: what is the "collection of a debt?" Like many ambiguous terms, there is a core of persons or objects to which the term clearly applies. Collection agencies, credit bureaus and the like who are hired by creditors to contact debtors in an effort to obtain payment of their debts plainly are engaged in the collection of debts within the meaning of the Act.

But the activities of an attorney, whose only contact may be through pleadings or correspondence with the debtor's counsel, do not neatly fit within the common, everyday use of the phrase "collection of a debt." Nor do actions such as filing pleadings or writing "rational and calm" letters to opposing counsel (J.A. 30) fall plainly within the scope of a statute whose purpose is to eliminate certain specific, obnoxious practices.

Litigation by an attorney against his client's adversary is not the "collection of debts" through use of interstate commerce or the mail. By filing a lawsuit, the attorney opts to use the judicial system as the appropriate means of enforcing the client's rights. It is only by judgment or settlement of the suit that the litigation can be resolved, rather than by the coarser methods of debt collection prohibited by the Act.

If the court of appeals' decision is allowed to stand, Congress has greatly expanded the scope of the Act's reach

by bringing a greater spectrum of attorney activity into the conceivable scope of the phrase "debt collector" than originally intended. Heintz submits that this was entirely inadvertent, based upon the legislative history and a review of the Act as a whole.

Two of the circuit courts which issued opinions similar to the court of appeals' decision in this case chide Heintz' argument as a "phantom limb" theory of statutory interpretation. *Fox v. Citicorp Credit Services*, 15 F.3d 1507, 1512 (9th Cir. 1994); *Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994). These courts view the attorneys' arguments as attempting to cling to an exemption from liability that was eliminated by the 1986 amendment.

This is simply a distortion of the arguments raised by collection litigators. Heintz and the defendants in *Fox* and *Paulemon* do not ask for a blanket immunity from liability. They recognize that they are subject to liability when they act as true debt collectors, assuming that they "regularly" engage in the business of collecting consumer debts.

The flaw in the *Fox* and *Paulemon* "phantom limb" criticism is that these courts refuse to recognize the ambiguity in the phrase "collection of debt". There is a world of difference between the act of contacting debtors to persuade them to pay their debts, and the drafting, filing, serving, and prosecuting a complaint, obtaining a judgment, and executing upon the judgment. This significant difference calls into question the breadth of the phrase "collection of a debt", especially since Congress did not have to consider how it related to attorneys when the Act was first passed.

A point which arises from Jenkins' complaint, and which was discussed in footnote no. 5 in *Fox* (15 F.3d at 1513), stems from the allegation that Heintz "regularly attempts

to collect debts due another" (J.A. 7), thereby making him a "debt collector." Heintz does not deny that for *some* clients, on *some* occasions, he does act as a debt collector. But the allegations in this case relate solely to the letter Heintz wrote to Jenkins' attorney. This letter, by its terms, relates to a matter already in litigation. In short, the fact that Heintz does act as a debt collector in some instances does not subject him to liability under the Act when his engagement, and the actions taken pursuant to that engagement, do not involve the debt collection activity addressed throughout the Act.

Finally, a number of courts have analyzed this definition, and found it subject to interpretation, such as the district court in this case (J.A. 26). See also *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993); *Green v. Hocking*, 792 F.Supp. 1064 (E.D. Mich. 1992); *Fireman's Insurance Co. of Newark, N.J. v. Keating*, 753 F.Supp. 1137 (S.D.N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F.Supp. 1139 (S.D.N.Y. 1990); *Concord Assets Finance Corp. v. Radebaugh*, 568 N.Y.S.2d 950 (1991); *See also Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480, 1484 (S.D. Ala. 1987) (the court utilized the legislative history in interpreting "debt collector" and stated that the statute was far from a model of drafting clarity).

The definition of "debt collector" is ambiguous, as applied to attorneys engaged solely to prosecute consumer debt litigation. Therefore, this Court should consider legislative history and other ancillary sources of interpretation. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). These sources unequivocally demonstrate that Heintz did not act as a debt collector in this case.

B. The Legislative History, Administrative Interpretation and Structure of the Act as a Whole Support Heintz' Argument That He Did Not Act as a Debt Collector in This Case.

To determine intent, this Court seeks guidance from the statutory structure, the relevant legislative history, the congressional purpose expressed in the Act, and the interpretation placed on it by the federal administrative agency charged with its enforcement. *United States v. Hohri*, 482 U.S. 64, 70 (1987); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 737 (1985). Using all of these tools of statutory interpretation, it is clear that Congress did not intend the Act to apply to an attorney whose sole function was to reduce a claim over a delinquent debt to judgment.

On November 26, 1985, the House Committee of Banking, Finance and Urban Affairs reported on the proposed amendment to the Act which would repeal the attorney exemption. H.R. Rep. No. 405, reprinted in 1986 *U.S. Code Cong. & Admin. News* at 1752. In that report, the Committee detailed how, since the passage of the Act, attorneys had entered the debt collection industry so that the number of attorney debt collectors exceeded the number of lay debt collectors. *Id.* The Committee went on to note several abusive practices prohibited by the Act which attorneys, but not lay debt collectors, could engage in because of their exemption. These included:

> Late night telephone calls to consumers, calls to consumers' employers concerning the consumers' debts, frequent and repeated calls to consumers, disclosure of consumers' debt to third parties, threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, harassment, abuse, threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken. *Id.* at 1755.

The report noted that many law firms which engage in debt collection employed lay persons as "account representatives" and employed procedures typically employed by ordinary debt collection firms. *Id.* at 1754. The Committee recommended doing away with the attorney exemption because "consumers should not be stripped of an important protection solely because the collector happens to have a law degree." *Id.*

The Committee's report makes it clear that the attorney exemption was repealed to prevent attorneys from engaging in the same abusive conduct as ordinary debt collectors merely because they were licensed to practice law. However, the abusive conduct discussed by the Committee had nothing to do with actions taken as part of litigating delinquent debt cases, and the report reveals no congressional intent to regulate the filing and prosecution of lawsuits to reduce debts to judgment. Furthermore, while *some* abusive types of debt collection correspondence are addressed by the Act, the legislative history says nothing about correspondence between opposing counsel in a pending case.

That Congress did not intend to cover litigation activity is further evidenced by the remarks of Representative Frank Annunzio, who sponsored the legislation repealing the attorney exemption. Representative Annunzio addressed the House of Representatives three months subsequent to the passage of the amendment deleting the attorney exemption. Representative Annunzio stated:

> Ethical attorneys need have no concerns about the impact of the Act on their practices. The [Act] regulates debt collection, *not the practice of law. Congress repealed the attorney exemption to the Act not because of attorneys' conduct in the courtroom, but because of their conduct in the back room. Only collection activities, not legal activities are covered by the*

> *Act.* The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature. . . . The Act only regulates the conduct of debt collectors, it does not prevent creditors through their attorneys, from pursuing any legal remedies available to them (emphasis added). 132 Cong. Rec. page 10,031 (1986).

Representative Annunzio further stated that "repeal of the exemption does not infringe upon the practice of law by attorneys. It does assure that consumers are protected from unfair and unethical practices, regardless of the profession of the collector." *Id.*

C. The Act as a Whole Reveals That Congress Could Not Have Intended to Apply It to Attorneys Engaged Solely in the Prosecution of Consumer Debt Litigation.

In interpreting statutory language, this Court will also review other provisions of the statute to determine whether the proposed interpretation will be consistent with other portions of the Act. See *United States v. Hohri*, 482 U.S. 64, 67 (1987); *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 488 (1985). It is a "fundamental proposition of statutory construction" that the meaning of a word shall be drawn from its context. *Deal v. U.S.*, 508 U.S. ____, 124 L.Ed.2d 44, 50 (1993).

Application of the term "debt collector" to attorneys involved in the litigation context is inconsistent with other provisions of the Act. Representative Annunzio recognized this when discussing the Act after passage of the 1986 amendment. He stated that because an attorney who actually brings a lawsuit to collect a debt "will be required to prove the validity of the debt as an element of the legal proceedings," the verification of a debt by the collector requirements (15 U.S.C. § 1692g(a)(4)) are not applicable "in the context of legal proceedings." 132 Cong. Rec. H10,031.

Other provisions of the Act are downright awkward if attorneys engaged in consumer debt litigation are considered "debt collectors." The Act provides that the debt collector, when acquiring location information about a consumer represented by an attorney, can only communicate with the attorney, "unless the attorney fails to respond within a reasonable period of time to communication from the debt collector." 15 U.S.C. § 1692b(6). The rules of professional conduct forbid an attorney from communicating with an opponent represented by counsel regardless of the responsiveness of that attorney. See ABA Model Rules of Prof. Cond., DR. 7-104(A)(1). If a litigating attorney is a "debt collector," the Act apparently countenances violating prevailing ethical standards.

The Act also provides that the debt collector may not communicate with the debtor if told not to, except to inform the debtor that further action may be taken. 15 U.S.C. § 1692c. This section makes no sense with regard to a litigation proceeding. Applied literally, an attorney suing a *pro se* debtor could not send him notice of court appearances, depositions or make settlement proposals. Nothing in the Act suggests that Congress meant to subvert the ordinary litigation processes.

Furthermore, the Act provides that within thirty days of the first notice, the consumer can inform the debt collector that the debt is disputed or that he requests the name and address of the original creditor. 15 U.S.C. § 1692g(b). If the debtor makes this written request, the debt collector must cease collection activity until complying with the request. Again, if an attorney pursuing litigation is a "debt collector", this provision allows the debtor to stop

the litigation process within the first thirty days. It would be an unusual statute which allows a defendant to cease proceedings unilaterally. Under the Federal Rules of Civil Procedure, for example, a defendant must respond to the complaint within twenty days of receiving summons. This also would conflict with F.R.C.P. 26, which mandates disclosure of documents and other information immediately after the commencement of litigation. Section 1692g(b) would appear to allow a debtor to disregard the rules of civil procedure if litigation is the "collection of a debt."

The only reference to litigation in the Act is not even directed to a deceptive or unfair practice in the actual prosecution of litigation. Section 1692i forbids a debt collector from bringing an action in a county other than the debtor's residence. 15 U.S.C. § 1692i. This section addresses an unfair *collection* technique, not a litigation practice. The choice of an inconvenient forum has nothing to do with litigation of the merits of the debt itself. Instead, Congress was attacking the unfair collection practice of making the debtor hire counsel and defend the suit in a distant forum, but this has nothing to do with the creditor's attorney's actual prosecution of the case.

In fact, Section 1692i(b) give rise to the ultimate irony in this case. If one inserts the word "attorney" for the word "debt collector," it would read, "nothing in this section shall be construed to authorizing the bringing of legal actions by [attorneys]." 15 U.S.C. § 1692i(b). This is not mere wordplay. Rather, it is proof that the original terms of the statute were meant to address non-attorney activity. However, when attorney debt collection activity became covered, that coverage could not extend to the ordinary litigation activities of an attorney, without producing absurd results.

Furthermore, Congress empowered the Federal Trade Commission to ensure compliance with the Act. If an attorney is considered a debt collector in the litigation context, the Act extends to the FTC authority to oversee attorney litigation practices. 15 U.S.C. § 1692l. Regulation of an attorney's conduct is traditionally the province of the courts, not the federal executive branch. Absent some compelling evidence to the contrary, Congress should not be presumed to have empowered the F.T.C. to assume this traditional judicial function.

Finally, attaching liability to an attorney's conduct as an advocate in the adversarial context runs directly counter to traditional common law immunities. Heintz' letter, in a more extreme circumstance, could be considered defamatory. However, nearly all jurisdictions hold that there is an absolute privilege for an attorney to publish defamatory matter related to litigation. This view is stated in the Restatement (Second) of Torts, which provides:

> "An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceedings." Restatement (Second) of Torts § 586 (1965).

The attorneys' absolute privilege, as stated in the Restatement (Second) of Torts § 586, and the attorney's derivative privilege to advise his client also immunizes an attorney from liability in suits for malicious interference with business (*McLaughlin v. Copeland*, 455 F. Supp. 749 (D. Del. 1978)), civil conspiracy to libel; (*Lerette v. Dean Witter Org. Inc.*, 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976)), intentional infliction of emotional harm; (*Janklow v. Keller*, 90 S.D. 322 (S.D. 1976)), deceit; (*Twyford v.*

Twyford, 63 Cal. App. 3d 916, 134 Cal. Rptr. 145 (1976)), abuse of process; (*Thorton v. Rhoden*, 245 Cal. App. 2d 80, 53 Cal. Rptr. 706 (1966)), based upon the allegedly defamatory publication.

An interpretation which would expose an attorney to liability for communications in the course of litigation would abrogate a common law immunity. In order to abrogate a common law principle, a statute must speak directly to the question addressed by the common law. *United States v. Texas*, 507 U.S. ____, 123 L. Ed. 2d 245, 252 (1993). The language of the Act scarcely "speaks directly" to the abrogation of traditional attorney immunity for litigation-related communications.

D. The Federal Trade Commission Unequivocally Supports Heintz' Interpretation of The Act.

Representative Annunzio's interpretation of the legislation which he sponsored is echoed by the Federal Trade Commission, the agency charged with administrative enforcement of the Act. 15 U.S.C. § 1692*l*. The FTC interprets and applies the Act in a number of ways, including responding to formal inquiries from the public, issuing formal, binding advisory opinions and issuing non-binding commentaries on its interpretation of the Act. 15 U.S.C. § 1692(a), 15 U.S.C. § 41 et seq.

If a statute is silent or ambiguous with respect to an issue, the courts should defer to a reasonable construction of the statute made by the enforcing agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 843-44 (1984).

The FTC's position was stated in its 1988 Staff Commentary on the Act: "an attorney or law firm whose efforts to collect consumer debts on behalf of its clients regularly include activities traditionally associated with debt collection, such as sending demand letters (dunning notices) or making collection calls to consumer," is included in the Act's definition of "debt collector." *Statement of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act*, 53 Fed. Reg. 50,097, 50,102 (1988). Conversely, "an attorney whose practice is limited to legal activities, (e.g., the filing and prosecution of lawsuits to reduce debts to judgment)" does not fall within the definition. *Id. See also* Noonan, *Federal Trade Commission Activity: Pursuing Unfair and Deceptive Practices In Consumer Financial Service*, 43 Bus. Law. 1069, 1075 (1988) (the FTC's interpretation of the Act is that attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector); *Dugan*, FTC activities, 44 Bus. Law. 1419, 1424 (1989).

The FTC remains consistent in its interpretation of the Act. On April 12, 1994 the Commission issued its 16th annual report to Congress on the Fair Debt Collection Practices Act. In the report, it stated:

> The Commission believes that FDCPA should be clarified to state explicitly that attorneys who simply file lawsuits are not debt collectors under the Act. For example, depositions would violate § 805(b) [§ 1692(b)]. Pleadings would trigger the § 809 [§ 1692g] and § 807(11) [§ 1692e(11)] disclosure requirements. If the consumer disputed the debt, the attorney/debt collector could be required to drop the suit because § 809(b) requires that collection activity cease until after verification. It is simply not practical to apply the FDCPA to the activities of litigation attorneys because coverage would produce anomalous results. The Commission therefore recommends that the Congress re-examine the definition of "debt collector" and clarify that an

attorney who pursues alleged debtors solely through litigation (or some similar "legal" practices)—as opposed to one who collects debts through the sending of dunning letters or making calls directly to the consumer (or similar "collection")—is not covered by the statute. (CCH, *Consumer Credit* at 84,595 (1994)).

E. F.R.C.P. 11, and Its State Law Counterparts, Already Regulate the Type of Litigation Activity Challenged by Jenkins' Complaint.

More than half the states have adopted, in whole or in part, the Federal Rules of Civil Procedure. Field, Kaplan & Clermont, *Materials for a Basic Course in Civil Procedure*, p. 30 (5th Ed. 1984). This includes Rule 11, which at the time the attorney amendment was deleted from the Act, forbade attorneys from filing lawsuits not "well-grounded in fact" or not "warranted by existing law, or a good faith argument for the extension, modification or reversal of existing law." Attorneys could not file actions "interposed for any improper purpose . . ." Most, if not all states have enacted analogous rules. *See, e.g., La. Stat. Ann*, Art. 863; *Conn. Gen. Stat. Ann.* § 51-84; *Ca. Civ. Pro.* § 1250.330.

These rules are the appropriate method of regulating the type of misconduct claimed by Jenkins. She claims that Heintz filed litigation to collect a debt she did not owe. He pursued this supposedly improper theory through correspondence to her attorney.

If it turns out that Jenkins is right, and that a minimal investigation would have disclosed that Gainer Bank had no right to add the allegedly improper insurance charge, a claim under Rule 11 or its state law counterpart could have been asserted.

There is nothing in the language of the Act which suggests that Congress needed the redundant sanction of an independent cause of action against the attorney to prevent this type of suit from being filed. *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993). Of course, with the exception of 15 U.S.C. § 1692i, Congress did not mention litigation at all in the Act. Even this section deals with matters entirely unrelated to the merits of the litigation itself.

CONCLUSION

Congress originally intended to protect consumers from the harassment and annoyance associated with dealing with ordinary debt collectors. The repealing of the attorney exemption to prevent attorneys from engaging in the same conduct does not mean that Congress intended conduct not originally covered by the Act to now become covered. Nothing in the Act's legislative history suggests that the purely legal activities involved in the reduction of a debt to judgment were intended to be covered. Legislative history, administrative interpretation, and the structure of the Act as a whole, indicate that such conduct was not intended to be covered. For these reasons, Heintz respectfully requests that this Court reverse the

judgment of the United States Court of Appeals for the Seventh Circuit, and reinstate the judgment of the District Court.

Respectfully submitted,

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Attorneys for Petitioners

HINSHAW & CULBERTSON
Of Counsel

Dated: December 15, 1994

No. 94-367

In The

Supreme Court of the United States

October Term, 1994

GEORGE W. HEINTZ
BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR RESPONDENT

JOANNE S. FAULKNER
(Counsel of Record)
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395

DANIEL A. EDELMAN
EDELMAN & COMBS
135 S. LaSalle Street
Suite 1006
Chicago, Illinois 60603
(312) 739-4200

RICHARD J. RUBIN
208 Griffin Street
Santa Fe, New Mexico 87501
(505) 984-1727

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

54pp.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES - Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

No. 94-367

In The

Supreme Court of the United States

October Term, 1994

GEORGE W. HEINTZ
BOWMAN, HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent ("Ms. Jenkins") sued Petitioners (collectively, "Attorney Heintz") under the Fair Debt Collection Practices Act ("FDCPA" or "the Act"), 15 U.S.C. §§ 1692-1692o, claiming that Attorney Heintz engaged in intentional debt padding, in violation of the explicit prohibitions of § 1692e(2) (misrepresentation of the character, amount or legal status of the debt) and § 1692f(1) (collecting an amount not expressly authorized by contract or law).

The principal purpose of the FDCPA is to protect a consumer from direct or indirect collection abuse, including false, deceptive, or unfair collection methods such as the debt padding in which Attorney Heintz engaged here. Congress recognized the

> universal agreement among scholars, law enforcement officials, and even debt collectors that the number of persons who willfully refuse to pay just debts is miniscule [sic]. . . . [T]he vast majority of consumers who obtain credit fully intend to repay their debts. When default occurs, it is nearly always due to an unforeseen event such as unemployment, overextension, serious illness, or marital difficulties or divorce.

S. Rep. No. 382, 95th Cong., 1st Sess. 3 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697.

> The [Consumer Credit Protection] Act is remedial in nature, designed to remedy what Congressional hearings revealed to be unscrupulous and predatory creditor practices throughout the nation. Since the statute is remedial in nature, its terms must be construed in liberal fashion if the underlying Congressional purpose is to be effectuated.

N.C. Freed Co. v. Board of Governors, 473 F.2d 1210, 1214 (2d Cir.), *cert. denied*, 414 U.S. 827 (1973); *accord Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 27 (2d Cir. 1989) ("Congress painted with a broad brush in the FDCPA to protect consumers from abusive and deceptive debt collection practices, and courts are not at liberty to excuse violations where the language of the statute clearly comprehends them . . . ").

In addition to "eliminating abusive debt collection practices by debt collectors," the FDCPA seeks to "ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). Nearly a decade after its adoption of the FDCPA, Congress repealed the original attorney exemption, partly because lawyers were "tout[ing] the[ir] exemption" and implying that they could engage in conduct prohibited to collection agencies. H.R. Rep. No. 405, 99th Cong., 2d Sess. 5 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1756.

The FDCPA prohibits oppressive, abusive, deceptive or unfair collection tactics by prohibiting certain conduct and by requiring that the consumer be given specific information. It limits the debt collector's communications with third parties and with the consumer under certain circumstances. 15 U.S.C. § 1692c. It forbids debt collectors to engage in other harassing or abusive debt collection techniques, § 1692d, and prohibits debt collectors from using false or misleading representations in connection with the collection of a debt. § 1692e. The FDCPA proscribes the use of "unfair or unconscionable" debt collection practices, including debt padding or collecting more than the amount authorized by the agreement creating the debt. § 1692f. The Act further requires the debt collector to verify a debt upon written notice that the consumer disputes it. § 1692g.[1]

---

[1] Attorney Heintz focuses on the FDCPA prohibitions against oppressive, abusive, deceptive, or unfair collection tactics, such as the debt padding involved in this case. However, the Act includes apparently innocuous, but prophylactic,

The Act relies on and encourages consumers, such as Ms. Jenkins, to act as private attorneys general to enforce the public policies expressed therein. 15 U.S.C. § 1692k(a). Indeed, Congress stated its unequivocal intent "that private enforcement actions would be the primary enforcement tool of the Act." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 780-81 (9th Cir. 1982).

There is no liability under the Act for any unintentional bona fide errors, if they occur despite procedures to avoid the error. § 1692k(c). Debt collectors who violate the FDCPA are liable for the actual damages caused by the violation, such additional damages (up to $1,000) as the court may allow after considering such factors as whether the violation was frequent or intentional, and the consumer's attorney fees. § 1692k.

The FDCPA defines "debt collector" to mean "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15

---

provisions as well. For instance, the FDCPA requires a "mini-Miranda" warning in all communications: "This is an effort to collect a debt, and any information obtained will be used for that purpose." 15 U.S.C. § 1692e(11). Before enactment of the FDCPA, collectors would, for example, extract information about the consumer (unlisted telephone number, bank account number) from responses to a postcard deceptively stating that providing the information would result in the receipt of something of value. *E.g., National Clearance Bureau v. FTC*, 255 F.2d 102 (3d Cir. 1958); *Silverman v. FTC*, 145 F.2d 751 (9th Cir. 1944); *see generally* 3 Trade Reg. Rep. (CCH) ¶ 7825.901.

U.S.C. § 1692a(6). A "debt" is any alleged obligation of a consumer to pay money, "whether or not reduced to judgment." 15 U.S.C. § 1692a(5).

When Congress first enacted the FDCPA, the definition of "debt collector" contained an exclusion for "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." Pub. L. 95-109, § 803(6)(F), 91 Stat. 874 (Sept. 20, 1977). In 1986, upon its determination that "consumers should not be stripped of an important protection solely because the collector happens to have a law degree," Congress repealed the FDCPA's attorney exemption, without enacting a replacement. Pub. L. 99-361, 100 Stat. 768 (July 9, 1986); H.R. Rep. No. 405, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752 at 1754.

Ms. Jenkins' amended complaint alleged that Attorney Heintz regularly collects consumer debts (thus meeting the definition of "debt collector"), and in so doing, systematically added amounts for collateral protection insurance to consumers' debts, knowing that such amounts were not authorized by contract or law. Pet. for Cert., App. 15. Attorney Heintz had actual knowledge of the true nature of the insurance imposed by the creditor client by April 1992. Am. Cmplt. ¶ 8. Over the last few years, Attorney Heintz's firm filed many collection actions in which the amount claimed included sums added by the creditor, after the inception of the contract, purportedly for insurance against loss or damage to the collateral. Am. Cmplt. ¶ 20. Most suits resulted in default judgments or agreements by the customer to pay on some basis, undoubtedly made without knowledge of the true nature of the "insurance" charges. *Id.*

Attorney Heintz moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), on the basis that an attorney is not within the definition of "debt collector" when engaged in "purely legal activities." J.A. 15. Discovery was stayed. J.A. 3. The district court granted the motion to dismiss. It recognized that "the FDCPA covers actions by attorneys who engage in the typical debt collecting activities proscribed by the Act," but found that the attorney's letter was not abusive, threatening, harassing or intimidating. J.A. 31. On appeal, the Seventh Circuit reversed, finding that "the Act reaches lawyers engaged in litigation." *Id.* at 38. "Knowingly making unauthorized charges in connection with debt collection is at least deceptive and misleading." *Id.* at 39.

This Court granted certiorari to determine whether the FDCPA's definition of "debt collector" applies to attorneys engaged solely in litigation.

SUMMARY OF ARGUMENT

An attorney who "regularly collects or attempts to collect" consumer debts on behalf of others is a "debt collector" under the plain language of the FDCPA. 15 U.S.C. § 1692a(6). When first enacted in 1977, the FDCPA's definition of "debt collector" included an exception for an attorney-at-law collecting "as an attorney" for a client. Pub. L. 95-109 § 803(6)(F). In 1986, however, Congress repealed that exemption after considering and rejecting the arguments advocated by Attorney Heintz and the Amici in this Court. Pub. L. 99-361, 100 Stat. 768 (July 9, 1986). The Act now contains no exemption for

attorneys, whether collecting debts through litigation or otherwise. Indeed, the FDCPA applied to litigation activities even before the repeal of the attorney exemption. Attorney Heintz's arguments that the definition of debt collector should be construed to exempt attorneys from the standards and requirements imposed by the FDCPA misread the provisions of the statute. Moreover, Attorney Heintz's contentions are contrary to Congress' express intent that attorneys who do not comply with the minimal standards set for debt collectors should face the same liability as nonattorney debt collectors.

ARGUMENT

In this Court, for the first time, Attorney Heintz concedes that he acts as a "debt collector" because his debt collection activities do not solely involve litigation. Pet. Brief at 11. Thus, the facts of this case do not support the question presented: "Whether an attorney engaged solely to prosecute litigation against a consumer is a 'debt collector' within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6))." Instead Attorney Heintz raises a distinct question, namely, whether the substantive provisions of the FDCPA apply to litigation-related activities of an attorney who is admittedly a "debt collector" under the statutory definition.

The facts of this case do not present the question which is created by the split in the circuits and for which review was granted, nor is it "fairly included therein."[2]

[2] There is no split among the circuits on the issue actually presented on the facts of this case. In *Green v. Hocking*, 9 F.3d 18,

See Sup. Ct. Rule 14(a); *Yee v. City of Escondido*, 112 S. Ct. 1522, 1533 (1992). Instead of the issue of who meets the definition of "debt collector" under the FDCPA, Attorney Heintz's argument concerns what activities are subject to the Act. There is a "heavy presumption" against the Court considering the separate issue presented on the facts of this case, and the exceptional circumstances necessary to overcome that presumption are not present here. *See id.* at 1532-34. For this reason, the Court should dismiss the petition.

If, however, the Court decides to address the merits, it should affirm the Seventh Circuit's decision because it is in accord with the plain language of the statute and the legislative history, as we discuss below.

I. THE PLAIN LANGUAGE OF THE FDCPA, AFTER UNQUALIFIED REPEAL OF THE ATTORNEY-AT-LAW EXEMPTION, IS UNAMBIGUOUS: AN ATTORNEY WHO REGULARLY COLLECTS CONSUMER DEBTS IS A "DEBT COLLECTOR"

A. The Definition of "Debt Collector" on its Face Plainly Includes Attorneys

The term "debt collector" is as broad as it can be, since it includes any person who – even indirectly – tries to collect a consumer debt assertedly owed to another. 15

19 (6th Cir. 1993) (per curiam), the attorney did not concede that he was a debt collector. The decision stressed that his "general practice consists solely of filing lawsuits for the collection of debts." The Sixth Circuit apparently would agree that an attorney, like Attorney Heintz, who is not solely engaged in litigation is subject to the FDCPA. 9 F.3d at 20 n.3.

U.S.C. § 1692a(6). "Any" contains no hint of an exception. *Hutto v. Finney*, 437 U.S. 678, 694 (1978); *Brooks v. United States*, 337 U.S. 49, 51 (1949).

An attorney who files a suit against a consumer debtor to recover a delinquent amount, as Attorney Heintz admittedly did, is a person directly attempting to collect a debt. Litigation is one of a variety of methods through which debts are collected. *Keokuk & Hamilton Bridge Co. v. Salm*, 258 U.S. 122, 125 (1922); *Babbitt v. Dutcher*, 216 U.S. 102, 111 (1910).

Attorney Heintz's claim that "litigation" and "debt collection" are mutually exclusive cannot be reconciled with the ordinary use of these terms. Nothing in the FDCPA suggests a dichotomy between litigation and debt collection.[3] While the FDCPA does not define "collect," the common meaning of the term includes reducing a claim to judgment and enforcing it against the assets or

[3] Indeed, Attorney Heintz's argument, in the opening brief at 8-9, that attorneys are not debt collectors is a reversal of the bar's historical position that only attorneys could be debt collectors. When collection agencies first arose, attorneys unsuccessfully contended that the agencies were engaged in the unauthorized practice of law, and that only attorneys could collect a debt. *E.g., Missouri ex rel. McKittrick v. C.S. Dudley & Co.*, 102 S.W.2d 895 (Mo.) (writing or calling to seek payment is merely acting as agent for creditor and is not unauthorized practice of law), *cert. denied*, 302 U.S. 693 (1937); *National Revenue Corp. v. Violet*, 807 F.2d 285 (1st Cir. 1986) (statute limiting debt collection to licensed attorneys unconstitutional). *Cf. J.H. Marshall & Assoc. v. Burleson*, 313 A.2d 587, 594-99 (D.C. 1973) (certain court-related aspects of debt collection involve the practice of law). *See generally* A.L. Schwartz, *Operations of Collection Agency as Unauthorized Practice of Law*, 27 A.L.R.3d 1152, 1156 (1969).

income of the debtor. "To collect a debt or claim is to obtain payment or liquidation of it, either by personal solicitation or legal proceedings." *Black's Law Dictionary* 263 (6th ed. 1990). "Absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 115 S. Ct. 382, 384 (1994).

Because the plain language of the FDCPA's broad definition includes attorneys, Congress initially enacted a limited exemption for an attorney-at-law collecting a debt "as an attorney" for a client. Pub. L. 95-109 § 803(6)(F). Admittedly, the initial exemption for an attorney acting "as an attorney" chiefly exempted litigation activities, since it has long been established that attorneys "do not 'act as lawyers' when not primarily engaged in legal activities." *Zenith Radio Corp. v. Radio Corp. of America*, 121 F. Supp. 792, 794 (D. Del. 1954) (patent lawyers).

> Attorney at law. Person admitted to practice law in his respective state and authorized to perform both civil and criminal legal functions for clients, including drafting of legal documents, giving of legal advice, and representing such before courts, administrative agencies, boards, etc.

Black's, supra, at 128. The practice of law:

> is not limited to appearing in court, or advising and performing of services in the conduct of the various shapes of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and in larger sense includes legal advice and counsel and preparation of legal instruments by which legal rights or obligations are established.

Id. at 1172. Thus, when Congress exempted "any attorney-at-law collecting a debt as an attorney," the exclusion applied primarily to attorneys engaged in court-related collection activities.[4] The blanket repeal of that exemption accomplishes exactly what Congress intended. Litigation activities of an attorney are now subject to the FDCPA.

With the exception of the Sixth Circuit's per curiam opinion, every appeals court which has considered the issue agrees with the Seventh Circuit in this case, that attorneys engaged in litigation are subject to the FDCPA, based on the plain language of the statute. *Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994) ("[W]e are skeptical that a litigation exemption exists in light of the plain statutory language of the FDCPA"); *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507, 1512 (9th Cir. 1994) ("The plain language of the statute unambiguously precludes any doctrine of special treatment for attorneys under the FDCPA"); *Scott v. Jones*, 964 F.2d 314, 318 (4th Cir. 1992) ("[T]he statutory definition of 'debt collector' is sufficiently clear to avoid recourse to the legislative history of the statute"); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120, 125 (Colo. 1992) ("Rather than restricting the attorney

---

[4] Before the repeal, an attorney collecting a debt through nonlitigation activities was within the FDCPA. *FTC v. Shaffner*, 626 F.2d 32, 36 (7th Cir. 1980) (distinguishing between lawyer practicing law, and acting in another capacity); *XYZ Law Firm v. FTC*, 525 F. Supp. 1235 (N.D. Ga. 1981) (no shield for debt collector simply because office operated by attorney). In addition, an attorney who allowed a creditor to use his or her letterhead without personal involvement was subject to liability under the FDCPA. § 1692j.

exception to those attorneys whose debt collection practices are limited to legal activities, Congress deleted the exception altogether").[5]

The only decision that departs from this analysis is *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (per curiam), which involved an attorney who had filed some 2,000 consumer collection cases. One consumer caught him padding the debt by claiming eighteen per cent interest rather than the contractual five per cent. One can infer that this debt padding happened more than once, whether due to use of form complaints, or an intentional effort to increase recovery for the attorney and the creditor. Because Mr. Hocking's law practice, unlike Attorney Heintz's, was limited to litigation, the Sixth Circuit ruled that he was exempt from the FDCPA.[6]

Under *Green*, 9 F.3d at 20 n.3, postjudgment efforts to collect an inflated judgment would be within the FDCPA. If enforcing an excessive judgment is within the FDCPA, surely litigating to get such a judgment should be as well.

A private attorney who performs collection services for the United States Government is subject to the

[5] Petitioners cite *dicta* in *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990), *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1137 (S.D.N.Y. 1990), and *Concord Assets Finance Corp. v. Radebaugh*, 172 A.D.2d 446, 568 N.Y.S.2d 950 (1991). Those commercial collection cases are not subject to the FDCPA in any event.

[6] According to *Green*, an attorney is now a "debt collector" within the FDCPA for venue, prelitigation, and postlitigation activities, but is not a "debt collector" for any other purpose. Thus, in the view of the Sixth Circuit, the defined term "debt collector" has different meanings depending on context.

FDCPA, notwithstanding any exemption. 31 U.S.C. § 3718(b)(6). There is no reason to allow a private attorney who collects for a private creditor to engage in activities that the FDCPA prohibits.

B. The FDCPA Has Always Applied to Litigation

Attorney Heintz's argument that the language of the FDCPA supports his claim rests on the premise that "[t]here is a world of difference" between "true debt collectors" and attorneys who collect debts through litigation. Petitioners' Brief at 10. As a matter of fact and law, however, there is no such bright line. In some states, nonattorney debt collectors can file lawsuits to collect debts in the same manner as attorneys and, thus, use both litigation and nonlitigation activities to collect debts. *See, e.g., Martinez v. Albuquerque Collection Serv., Inc.*, No. CIV 93-1468 JB, 1994 WL 622231 (D.N.M. Oct. 14, 1994); *Cruz v. Lusk Collection Agency*, 580 P.2d 1210 (Ariz. App. 1978); *Messmer v. Carter*, 578 P.2d 788 (Or. 1978); Cal. Civil Code § 1788.15 (West 1985); Fla. Stat. Ann. § 559.715 (Supp. 1995); Pa. Stat. Ann. tit. 18 ch. 73 § 7311(b) (Supp. 1994); Wyo. Stat. § 33-11-114 (1987). Nonattorney debt collectors are plainly subject to the FDCPA whether or not they have initiated litigation to collect the debt. With the 1986 amendment, Congress provided that attorneys regularly engaged in collecting debts through litigation are subject to the same requirements as nonattorneys.

Attorney Heintz's argument that litigation does not fall within the FDCPA's conception of "collection of a debt," Petitioners' Brief at 9, is foreclosed by the fact that, from its inception, the FDCPA has directly applied to

litigation activities. For example, in *Kimber v. Federal Financial Corp.*, 668 F. Supp. 1480, 1487 (M.D. Ala. 1987), a collection agency violated § 1692f (unfair or unconscionable practices) by filing a time-barred suit. Similarly, in *Kolker v. Duke City Collection Agency*, 750 F. Supp. 468 (D.N.M. 1990), a collection agency violated the FDCPA by filing collection litigation in contravention of state law restraints on unauthorized practice of law.

Indeed, the FDCPA contains several provisions which would be superfluous if litigation activities were exempt from the coverage of the FDCPA:

1. The FDCPA regulates the venue of legal actions. 15 U.S.C. § 1692i. Attorney Heintz and the Amici concede that the venue provision applies to attorneys. They do not, however, explain why the defined term "debt collector" has a meaning which includes attorneys in the venue provision, but does not have the same meaning elsewhere in the FDCPA. *Cf. Brown v. Gardner*, 115 S. Ct. 552, 555 (1994).

2. The FDCPA exempts from the definition of "debt collector" persons "attempting to serve legal process on any other person in connection with the judicial enforcement of any debt." § 1692a(6)(D). If there were a blanket exemption for all litigation activities, this provision would be unnecessary.

3. The FDCPA permits third party communications which are "reasonably necessary to effectuate a postjudgment judicial remedy." 15 U.S.C. § 1692c(b).

4. The FDCPA prohibits misrepresenting that legal process is not legal process or does not require action by

the consumer. 15 U.S.C. § 1692e(15). A common consumer complaint is that collection agencies would tell them that they did not have to appear in court even though nonappearance would result in a default or a judgment. The provision relates directly to litigation practices.

5. The FDCPA prohibits threats of garnishment or attachment of wages or other property, "unless such action is lawful and the debt collector or creditor intends to take such action." § 1692e(4). Normally, a judgment is a precondition to garnishment or attachment.

6. The FDCPA requires verification of a demand to pay a judgment. § 1692g.

7. The FDCPA precludes a debt collector from using the consumer's failure to dispute a debt "as an admission of liability" in any court. § 1692g(c).

Other FDCPA sections, while not directly addressing litigation, relate to misconduct by collection agencies or attorneys which could occur in association with litigation:

1. § 1692e(2)(A), misrepresenting the character, amount or legal status of any debt, such as suing beyond the statute of limitations, *Kimber*, 668 F. Supp. 1480;

2. § 1692e(2)(B), filing complaint seeking lawyer's fees when none are due, *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992);

3. § 1692e(9), sending a communication which seems to come from a court but does not, *Tolentino v. Friedman*, 833 F. Supp. 697, 701 (N.D. Ill. 1993);

4. § 1692e(13), falsely representing that documents are legal process;

5. § 1692f(1), collecting an amount not expressly authorized by the contract or permitted by law;

6. § 1692f (6), taking nonjudicial action to dispossess property.

All the provisions which relate directly to litigation activities would be largely meaningless if, as Attorney Heintz claims, litigation does not constitute "collection of a debt" under the Act. "Congress is not to be presumed to have used words for no purpose. . . . [T]he admitted rules of statutory construction declare that a legislature is presumed to have used no superfluous words." *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (1878).

Even when attorneys were exempt from the definition of "debt collector," the FDCPA applied to litigation by nonattorney debt collectors. Congress repealed this exemption in 1986 to ensure that attorneys would no longer be able to claim the exempt status that Attorney Heintz claims here.

II. THE LEGISLATIVE HISTORY CONFIRMS THE PLAIN LANGUAGE OF THE FDCPA

Congress' across-the-board repeal of the attorney exemption is unambiguous. The repeal of the limited exemption for an attorney acting as an attorney (conducting purely legal activities) unequivocally demonstrates that attorneys conducting litigation must comply with the FDCPA. There is no need to go beyond the plain language

of the FDCPA; by virtue of the repeal, the Act unambiguously includes attorneys regularly engaged in litigation activities.[7] *Cf. Brown v. Gardner*, 115 S. Ct. at 555.

The legislative history, however, confirms the plain language of the Act. Congress recognized that both collection agencies and attorneys engaged in certain abuses:

> These abuses, all prohibited by the Act, but inapplicable due to the attorney exemption, included . . . threats of legal action on small debts where there is little likelihood that legal action will be taken, simulation of legal process, . . . threats of seizure, and attachment and sale of property where there is little likelihood that such action will be taken.

H.R. Rep. No. 405, 99th Cong., 2d Sess. 4 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1755. Therefore, "[t]he Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act, if they meet the definition of debt collector contained in [§ 1692a(6)]. *Distinctions between attorney debt collectors and lay debt collectors are eliminated. . . .*" *Id.* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 1754 (emphasis added).

As we show below, in repealing the exemption, Congress considered and rejected the arguments now urged

---

[7] Sporadic collection efforts are not within the FDCPA, but "any attorney who engages in collection activities more than a handful of times per year must comply with the" FDCPA. *Crossley v. Lieberman*, 868 F.2d 566, 569 (3d Cir. 1989) (quoting Robert Hobbs, *Attorneys Must Now Comply with the Fair Debt Collection Law*, X Pa. J.L. Rptr., No. 46, 3 (Nov. 21, 1987)). *See generally* 1986 U.S.C.C.A.N. 1752.

on this Court by Attorney Heintz: that existing mechanisms for curbing lawyers' misbehavior are adequate and that application of the FDCPA to litigation would be burdensome.

A. House Debate

Both supporters and opponents of the 1986 amendment took the position that the amendment would apply to lawyers "who collect on an occasional basis" and "the small law firm which collects debts incidentally to the general practice of law." 131 Cong. Rec. H10534-10536 (daily ed. Dec. 2, 1985) (remarks of Reps. Annunzio and Hiler).

> H.R. 237 is a fairness bill. It makes certain that all debt collectors operate under the same set of rules, a set of rules which debt collectors themselves have testified are easy to follow and do not restrict the business of ethical debt collectors. . . .
>
> It turns out that rather than a few complaints, the FTC has received some 1,400 complaints about lawyer-collectors. Thus, it is not just the lawyer collection firms that are causing problems but also lawyers who collect on an occasional basis. . . .
>
> I should also point out that what we are asking lawyers to do is not very complicated. We only want them to operate in an ethical way. Any lawyer who can't follow the few simple guidelines in the act, should not have a license to practice law. . . .
>
> We should go on record that we do not set lower standards of conduct for lawyers than we do for other businesses.

131 Cong. Rec. at H10535 (remarks of Rep. Annunzio).

Congressman Hiler opposed the blanket repeal of the attorney exemption with the same arguments as are being made to this Court – that litigation activities would be adversely affected:

> The Federal Trade Commission has maintained that subjection to the FDCPA would create practical problems for attorneys collecting debts as attorneys-at-law. In particular, they have indicated that the application of sections 804 [§ 1692b], 805(b) [§ 1692c(b)], 805(c) [§ 1692c(c)], and 809 [§ 1692g] to such attorneys would inhibit their ability to effectively represent a client. For example, if attorneys are subject to sections 804 and 805(b), their ability to contact third parties in order to facilitate settlements will be severely limited. In addition, the application of section 809, which deals with the validation of debts, could very easily interfere with a client's right to pursue judicial remedies.
>
> The American Bar Association and Commercial Law League of America also have expressed concern with the potential effects of certain provisions of the FDCPA on the practice of law as it relates to debt collection.

131 Cong. Rec. at H10535. Congressman Hiler's arguments did not prevail.

B. House Report

The House Report also supports the position that the 1986 amendment intended to provide "that *any* attorney who collects debts on behalf of a client shall be subject to the provisions of" the FDCPA. H.R. Rep. No. 405, *supra*, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758 (emphasis added).

> The application of several provisions of the Act to attorneys collecting debts are worthy of note. The restrictions of sections 804 and 805(b) [§§ 1692b and 1692c(b)] on contacts with third parties regarding a consumer's debt are intended to protect the privacy of consumers' financial affairs. These contacts are not legitimate collection practices and result in serious invasions of privacy, as well as the loss of jobs. *The Committee discerns no reason to make any distinction based upon the identity of the debt collector.*
>
> Section 805(c) [§ 1692c(c)] of the Act requires that a debt collector cease communication with a debtor when the debtor so requests. The provision is a means by which the consumer can end what he or she considers harassment and *bring the matter of the debt to a head.* Like the proscription on third party contacts, *the Committee finds no reason to permit attorneys to engage in conduct prohibited lay debt collectors.*
>
> Requiring the validation of debts under section 809 [§ 1692g] "protects people who do not owe money at all." . . . *Attorneys, no less than lay collectors, can make errors* in cases involving common names or similar addresses. *Consumers should not be stripped of an important protection solely because the collector happens to have a law degree.*

H.R. Rep. No. 405, *supra* at 3, *reprinted in* 1986 U.S.C.C.A.N. at 1753-54 (emphasis added).

Congress considered and rejected the arguments made in this Court by Attorney Heintz. Congress expressly found "that current law does not adequately protect consumers from attorney debt collection abuses

and that repeal of the attorney exemption to the Fair Debt Collection Practices Act is an appropriate way to reduce the amount of this abuse," *id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758, just as it rejected the original argument that existing laws rendered adoption of the FDCPA unnecessary. 15 U.S.C. § 1692(b). Specifically, Congress found that "[c]learly, bar associations have failed to fulfill their obligations underlying the premise of the attorney exemption [from the FDCPA]. There is no indication that this is about to change. Having undermined the basis for the exemption, attorneys cannot complain about being brought under the Act." *Id.* at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1757. *See also* Congressman Annunzio's statement on the floor of Congress:

> There are those who claim that H.R. 237 is unnecessary because attorney violations are rare and can be handled on a case-by-case basis by State and local bar associations. Unfortunately, the record does not bear this out. As early as 1968, the New York City Bar Association noted:
>
> > The staggering increase in recent years in installment and other credit sales has had a profound affect on that segment of the bar involved in collection work. The demand of volume threatens to destroy all vestiges of professionalism. The problem is too extensive to be remedied on a case-by-case basis.

131 Cong. Rec. at H10535.

Congressional hearings on the proposal to delete the attorney exemption were held on January 31, 1984, and October 22, 1985. At the 1985 hearing, a representative of the collection industry testified:

> The FTC seems to believe, as you and we do, that attorney collectors should be treated the same as third party collectors. But then the Commission seems to elevate an elite, unidentified group of attorneys above the law and claims they should be exempt from the consumer protection provided by the FDCPA. We don't follow that logic. Either you are or you are not collecting a debt for another person.

Hearing To Amend the FDCPA Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs, H.R. 237, 99th Cong. 1st Sess. 113 (statement of Walter E. Kurth, President, Associated Credit Bureaus, Inc.).

C. Rejected Alternatives

After opposing the blanket repeal of the attorney exemption, Amici now ask this Court to supply by interpretation precisely that which they could not secure by legislation.

The Commercial Law League of America and the American Bar Association, Amici herein, asked Congress to continue to exempt lawyers performing traditional legal services from the scope of the FDCPA. 131 Cong. Rec. at H10535; Leonard O. Abrams, *Testimony on Behalf of the Commercial Law League of America,* 90 Comm. L.J. 649, 650-51 (1985). Congress specifically rejected their proposal. Congressman Hiler introduced an amendment that would have limited the attorney exemption instead of repealing it, so as *not* to affect an attorney's incidental collection practice. His proposed amendment was defeated. Congressman Shumway offered an amendment to except attorneys from sections 804(1)-(3), 805(b)-(c), and 809. That amendment was defeated as well. Dissenting

Views of Rep. Hiler, H.R. Rep. No. 405, *supra* at 11, *reprinted in* 1986 U.S.C.C.A.N. at 1761.

Congress' rejection of these alternatives forecloses Attorney Heintz's argument here. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442 (1987). There is a strong presumption "against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp. v. Copp Paving Co.,* 419 U.S. 186, 199 (1974). "Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment." 2A *Sutherland Statutory Construction* § 48.18, at 369 (5th ed. 1992). Unsuccessful efforts to have an exception included in a statute indicate that the statute as passed does not include the exception. *United States v. Pfitsch,* 256 U.S. 547, 551-52 (1921) (Congress took "deliberate action in the face of opposition" and "had this question presented to its attention in a most precise form").

D. Post-enactment Statement of Rep. Annunzio

Attorney Heintz contends that the unequivocal repeal of FDCPA's exemption, for an attorney acting as an attorney, is ambiguous. Thus, he urges the Court to interpret the repeal on the basis of a post-enactment statement of Congressman Annunzio, inserted in the Congressional Record three months after the repeal as a matter of privilege, but never spoken on the floor of Congress. 132

Cong. Rec. H10031 (daily ed. Oct. 14, 1986). His comments are set forth in full in the Appendix.

"Post-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage." *In re Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974). *See also Bath Iron Works Corp. v. Director, OWCP,* 113 S. Ct. 692, 700 (1993) ("[W]e give no weight to a single reference by a single Senator during floor debate in the Senate" when the text of the statute is unambiguous); *West Virginia Univ. Hosps. v. Casey*, 499 U.S. 83, 98-99 (1991) (unambiguous statute cannot be expanded or contracted even by statements of individual legislators or committees during the enactment process); *Kelly v. Robinson*, 479 U.S. 36, 51 n.13 (1986) (Court accords no significance to statements not made by members of Congress and not included in official House or Senate reports). Consequently, Congressman Annunzio's post-passage remarks may not be considered in construing the meaning of the 1986 repeal.[8]

[8] *Green*, the only circuit court decision to conclude that attorneys engaged solely in litigation are not subject to the FDCPA, interpreted the unequivocal repeal of the attorney exemption in the supposed context of its legislative history. Yet, *Green* reached beyond the repeal and its contemporaneous legislative history to Congressman Annunzio's post-enactment statement. The opinion does not mention, and the court may not have realized, that the post-passage remarks were not made on the floor of Congress and are inconsistent with Mr. Annunzio's pre-passage remarks.

E. The FTC Staff's Enforcement Position

The Federal Trade Commission ("FTC") opposed the repeal of the attorney exemption. 131 Cong. Rec. at H10535. After Congress rejected the FTC's position, its staff adopted a policy of not applying the FDCPA to attorneys who engage solely in litigation:

> Attorneys or law firms that engage in traditional debt collection activities (sending dunning letters, making collection calls to consumers) are covered by the FDCPA, but those whose practice is limited to legal activities are not covered.

Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50097, 50100 (1988) (hereinafter "Commentary").

The FTC staff's enforcement position does not affect the FDCPA's application to attorneys. The FTC may not adopt regulations under the FDCPA. 15 U.S.C. § 1692*l*(d).[9] The FTC Staff Commentary, by its own terms, "is not binding on the Commission or the public." 53 Fed. Reg. 50101. Since the staff's enforcement position is at odds with the plain language of the FDCPA, it is entitled to no deference. *Brown v. Gardner*, 115 S. Ct. at 557. In addition, since the FTC itself may not interpret the FDCPA so as to override the blanket repeal of the attorney exemption, the pronouncements of its staff certainly do not have that effect.

[9] *Cf. Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566-68 (1980) (regulatory interpretations entitled to deference because Truth in Lending Act provides that Federal Reserve "Board shall prescribe regulations to carry out the purposes of this subchapter." 15 U.S.C. § 1604(a)).

Indeed, circuit courts routinely reject the staff's Commentary when it deviates from the terms of the FDCPA. *E.g.*, *Fox*, 15 F.3d at 1513 ("declining to adopt the FTC's position because it conflicts with the plain language of the statute"); *Dutton*, 5 F.3d at 654 (FTC position unpersuasive since conflicts with statutory language); *Scott*, 964 F.2d at 317 ("We decline to adopt the FTC's position"); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459, 461 n.4 (4th Cir. 1992) ("We find the position of the FTC unpersuasive"); *Staub v. Harris*, 626 F.2d 275, 279 (3d Cir. 1980) ("We decline to follow" informal staff letter). *Cf. Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22 (2d Cir. 1989) (rejecting FTC staff interpretation on § 1692e(11) notice); *Swanson v. Southern Or. Credit Serv., Inc.*, 869 F.2d 1222 (9th Cir. 1988) (rejecting FTC staff interpretation on § 1692g notice).

Moreover, even the Commentary does not support Attorney Heintz's position. The Commentary states only that an attorney whose practice is "limited" to legal activities is not within the definition of a "debt collector" under § 1692a(6). According to the Commentary, the legal activities of an attorney who does not simply litigate, but also otherwise meets the definition of a "debt collector" (as Attorney Heintz concedes in this Court for the first time that he generally does) are within the scope of the FDCPA for all purposes. 53 Fed. Reg. at 50102, col. 2.[10]

[10] Attorney Heintz has concisely and accurately summarized the FTC staff's position, that "attorneys must be engaged in collection activity, apart from collection litigation, to come within the definition of a debt collector." Pet. Brief at 19. However, in view of his admission that, in fact, "he does act as a debt collector" by engaging in nonlitigation activities, *id.* at 11, and

III. THE REPEAL DOES NOT LEAD TO ABSURD RESULTS

Attorney Heintz argues that the FDCPA should be construed to exempt attorneys engaged in litigation (even if they are otherwise debt collectors) because, he says, applying some of the provisions of the Act to litigation would be "awkward." Petitioners' Brief at 15. He claims that to subject litigation activities to the FDCPA would lead to various absurd results, such as inability to bring a legal action if the debtor demanded that collection cease. 15 U.S.C. § 1692c(c). Yet, Congressman Annunzio himself said, in the post-enactment statement on which Petitioners rely, "Suggestions that the repeal of the attorney exemption prohibits bringing legal action is an absurd reading of the act."

A. There is Nothing Absurd About Preventing an Attorney from Padding Debts

To insure that "means other than misrepresentation" are used for the collection of a debt, 15 U.S.C. § 1692(c), Congress specifically prohibited "[t]he false representation of – (A) the character, amount or legal status of any debt." 15 U.S.C. § 1692e(2). Congress also prohibited "the threat to take any action that cannot legally be taken," § 1692e(5), such as demanding unlawful interest or

in view of *Green*'s adoption of the narrow staff Commentary position, 9 F.3d at 22, there is no extant authority supporting the position that Attorney Heintz is not a debt collector on the facts presented by this case.

charges. Apparently concerned that these prohibitions were not enough, Congress also specifically prohibited the collection of any amount which is not expressly permitted by the agreement creating the debt, § 1692f(1); the false representation of any compensation which may be lawfully received by any debt collector for collection of a debt, § 1692e(2)(B); and the use of any false or deceptive means to attempt to collect any debt. 15 U.S.C. § 1692e(10).

The FDCPA's multiple prohibition of efforts to collect excessive amounts indicates a strong congressional policy: Debt collectors cannot demand or sue for excessive charges or fees. Debt padding is one of the more frequent violations of the FDCPA, one which adversely affects consumers' pocketbooks. *E.g., Dutton v. Wolhar*, 809 F. Supp. 1130, 1140 (D. Del. 1992), *aff'd sub nom. Dutton v. Wolpoff & Abramson*, 5 F.3d 649 (3d Cir. 1993) (attorney sought costs prohibited by law); *Crossley v. Lieberman*, 868 F.2d 566, 571 (3d Cir. 1989) (attorney demanded payment of costs not incurred); *Martinez*, 1994 WL 622231 (collection agency's default judgment illegally included excess charges for taxes, attorney's fees and interest); *Strange v. Wexler*, 796 F. Supp. 1117, 1120 (N.D. Ill 1992) (attorney added attorney's fees illegally); *Cacace v. Lucas*, 775 F. Supp. 502, 505 (D. Conn. 1990) (attorney demanded more than double amount due); *Piscatelli v. Universal Adjustment Servs., Inc.*, Consumer Cred. Guide (CCH) ¶ 96,377 (D. Conn. 1985) (adding a 25% collection fee to agency's claim violated 15 U.S.C. § 1692f(1) where a state statute limited such fees to 15%); *West v. Costen*, 558 F. Supp. 564, 581-82 (W.D. Va. 1983) (unauthorized $15 charges on bad checks); *Duran v. Credit Bureau of Yuma, Inc.*, 93 F.R.D. 607

(D. Ariz. 1982) (adding illegal fee); *Wegmans Food Markets, Inc. v. Scrimpsher*, 17 B.R. 999 (Bankr. N.D.N.Y. 1982) ($5 service charge); *Johnson v. Statewide Collections, Inc.*, 778 P.2d 93 (Wyo. 1989) (demanding more than amount due); *Venes v. Professional Serv. Bureau, Inc.*, 353 N.W.2d 671, 675 (Minn. Ct. App. 1984) (collection agency added interest despite knowledge that creditor's policy precluded interest). Many unreported debt padding cases are found at National Consumer Law Center, *Fair Debt Collection*, § 5.7.3 n.388; § 5.8.2 nn.622-627 (2d ed. 1991 & Supp. 1994).

It is entirely appropriate that attorneys like Petitioners, no less than other debt collectors, should be subject to this prohibition on collecting unauthorized charges from consumers. Under Attorney Heintz's view, neither a collection agency nor an attorney could demand excessive charges outside of litigation. Yet, a collection agency suing for excessive charges would be liable under the FDCPA, but an attorney who did the same thing would not be liable. Such a result is indeed absurd; it is precisely the result that Congress sought to avoid when it deleted the attorney exemption in 1986. Lawyers should not be allowed to evade the FDCPA's restrictions.

B. The FDCPA Permits Normal Litigation Activities

The application of the FDCPA to attorneys does not interfere with their ability properly to represent their clients or collect debts through litigation. Attorney Heintz's arguments to the contrary are meritless.

First, Attorney Heintz argues that the provision which allows a consumer to notify a debt collector to cease further communications would prohibit attorneys from filing lawsuits or sending consumers court notices. Petitioners' Brief at 15. On the contrary, even if a consumer refuses to pay or makes a written demand that collection efforts cease, the FDCPA allows the collector "to notify the consumer that the debt collector or creditor may invoke specified remedies" or "intends to invoke a specified remedy." § 1692c(c)(2), (3). A "remedy" is a means of enforcing a contractual right. *Edwards v. Kearzey*, 96 U.S. 595, 600, 607 (1877). For a consumer debt, the remedy might be repossessing an item in which the creditor has a security interest, or litigation to get a judgment enforceable by a garnishment or judgment lien. The FDCPA, in § 1692c(c)(2) and (3), repeatedly recognizes that the remedy of litigation may be part of collection efforts.

Second, Attorney Heintz hypothesizes that an attorney could not communicate with a court clerk's office, since to do so purportedly would violate the prohibition against third person contacts. Since the FDCPA recognizes that litigation may ensue, and since the court clerk is not a "person" as defined, the fear is chimerical.[11] In all the years since the FDCPA was enacted, and even since the attorney exemption was repealed, no one (other than Attorney Heintz or the Amici) has claimed that activity conducted in the context of normal collection litigation constitutes a "communication," as defined (§ 1692a(2)), which violates the FDCPA's prohibition on third party communications.

In addition, the FDCPA explicitly permits all communications made "with the express permission of a court of competent jurisdiction." 15 U.S.C. § 1692c(b). Permitted contacts would include contacts with process servers and deponents authorized by court rules and orders.[12]

Finally, the FDCPA does not require notices in court pleadings. A court paper is not a "communication" because of the definition of "person." A literal reading of the FDCPA does not require the statutory notices of § 1692e(11) or § 1692g in pleadings. But if there were such a requirement, inserting the notices would be simple. Indeed, if the attorney has not sent a prelitigation demand letter, it might be prudent to elicit consumer disputes by including the 30-day validation notice in the complaint, as many collection attorneys already do. 15 U.S.C. § 1692g. Providing a validation notice would not bring litigation to a halt, since an attorney is obligated to conduct a reasonable inquiry before filing the complaint. Thus, the attorney can provide the requested validation virtually by return mail.

---

[11] "Person" is defined in 1 U.S.C. 1 to mean "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." A governmental agency is not within the definition of person. *Cf.* the Equal Credit Opportunity Act (15 U.S.C. § 1691a(f)) and Fair Credit Reporting Act (15 U.S.C. § 1681a(b)) definitions of "person" which specifically include a governmental agency.

[12] Depositions are rare, indeed, in run-of-the-mill collection cases.

C. The FDCPA Does Not Affect Legitimate Lawsuits

Without authority for the proposition, Amicus The Commercial Law League posits that if an attorney brings a suit against a consumer and loses on any issue, the attorney would be liable for having taken an action that "cannot legally be taken." § 1692e(5). But bringing a nonfrivolous suit is not an action which "cannot legally be taken." *Cf. Hughes v. Rowe,* 449 U.S. 5, 14 (1980) ("[E]ven if the law or the facts are somewhat questionable or unfavorable at the outset of litigation, a party may have an entirely reasonable ground for bringing suit"). The difference is that between asking a court to determine a disputed issue and knowingly slipping spurious charges into a complaint in the hope that no one will notice.

An attorney is properly called to account under the FDCPA for knowingly bringing suit on claims that do not exist – such as seeking attorney's fees when there is no statutory or contractual basis for them, or, as here, suing for an amount to which the attorney knows the creditor is not entitled – in the hope that a judge or clerk entering hundreds of default judgments, or the rare consumer defending the case, will not notice.

D. The Risk of Liability Under the FDCPA Is Minimal

Conscientious attorney debt collectors who perform their duties in conformity with the ethical obligations of the profession and prevailing standards of reasonable

and adequate inquiry into the facts and law of the case, have no legitimate reason to complain of the 1986 amendment and the FDCPA's application to their litigation activities. Indeed, the risk of liability under the FDCPA has the desired effect of making attorneys adhere to their ethical obligations to review each file for the validity of the claim before suit. *E.g., United States v. Central Adj. Bureau, Inc.,* 667 F. Supp. 370, 380 (N.D. Tex. 1986), *aff'd,* 823 F.2d 880 (5th Cir. 1987) (attorney must review the file to determine the merits of the claim). To use *Green* as an example, if Attorney Hocking made an honest mistake, he could have limited his FDCPA exposure readily by simply admitting the violation, and providing an explanation. This prudent course undoubtedly would have reduced or eliminated statutory damages (there is no guaranteed minimum) and forestalled accrual of private attorney general fees.[13] If his client misstated the amount due and his office had reasonable procedures to catch such errors, he would have no liability, at least for the first such error.[14]

---

[13] *Cf. Crossley v. Lieberman,* 868 F.2d 566 (3d Cir. 1989) (award increased from $100 to $1,000 because vigorous defense indicated intent to continue course of conduct).

[14] Section 1692k(c) provides: "A debt collector may not be held liable in any action brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *See Fox,* 15 F.3d at 1514. The seminal "bona fide error" case under a parallel provision of the Truth in Lending Act, 15 U.S.C. § 1640(c), is *Mirabal v. General Motors Acceptance Corp.,* 537 F.2d 871 (7th Cir. 1976).

E. Common Law Immunities Do Not Apply

Attorney Heintz also argues that the FDCPA should be construed to incorporate state common law doctrines providing attorneys with an absolute privilege that protects them from liability for defamatory statements made in connection with litigation.[15] Petitioners' Brief at 17. This argument fails for two reasons.

First, an FDCPA action is not a defamation action. Common law privilege doctrines do not provide attorneys with immunity from *any* liability for conduct related to litigation. *See Tower v. Glover*, 467 U.S. 914, 922 (1984) (common law immunity for defamatory statements made in judicial proceedings would not cover conspiracy to secure conviction). Here, Ms. Jenkins' complaint alleges that Attorney Heintz engaged in a practice which is explicitly prohibited by several sections of the FDCPA when he demanded that the consumer pay unauthorized charges. Nothing in the common law provides that attorneys may engage in debt padding with impunity as long as their conduct is related to litigation.

Second, the FDCPA does not incorporate state common law immunities. The FDCPA has its source in the Federal Trade Commission Act, 15 U.S.C. § 45, which this

[15] The state common law of privilege applies to parties and witnesses, as well as to lawyers. Restatement (Second) Torts § 587 (1965). Like some of the arguments made by Amicus The Commercial Law League, the privilege argument represents a disagreement with congressional policy decisions applicable to lay debt collectors as well as lawyers. Ms. Jenkins does not address other arguments which are not peculiar to the FDCPA's application to litigation.

Court has recognized is not tied to common law standards. *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 240, 243 (1972). There is no indication that, in creating a *federal* remedy for improper debt collection practices, Congress intended to incorporate *state* law immunities. Rather, the FDCPA contains its own immunities, § 1692a(6), and its own defenses to liability. § 1692k(c),(e). The Act further provides that inconsistent state laws are preempted, but state laws that provide greater protection to consumers are not affected. § 1692n. Because Congress explicitly addressed the FDCPA's relationship to state law, and adopted defenses and immunities without any suggestion that state common law immunities should also be incorporated, Attorney Heintz's argument must fail.

IV. ATTORNEY MISCONDUCT IN LITIGATION IS NECESSARILY WITHIN THE FDCPA

Since the 1986 repeal of the attorney exemption, none of the extreme examples conjured up by Attorney Heintz or the Amici has occurred. Case law properly holds attorneys liable for FDCPA violations in the context of legal activities, ranging from prelitigation demands, to litigation, to postlitigation efforts to enforce a judgment. *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992) (postjudgment collection letter); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) (filing suit in wrong venue); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir.), *cert. denied*, 113 S. Ct. 298 (1992) (prelitigation collection letter); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991) (prelitigation collection letter); *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989) (prelitigation collection letter); *Tolentino v. Friedman*, 833 F. Supp. 697 (N.D. Ill. 1993) (mailing "important notice" with copy

of filed court papers); *Sluys v. Hand*, 831 F. Supp. 321 (S.D.N.Y. 1993) (prelitigation collection letter); *Cortright v. Thompson*, 812 F. Supp. 772 (N.D. Ill. 1992) (prelitigation collection letter); *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992) (filing complaint seeking attorney's fees which were not available; FDCPA gives attorney incentive to "pay more attention to the complaints he files" or "dissuade[s] him from taking advantage of debtors who do not know their rights"); *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992) (prelitigation collection letter); *Cacace v. Lucas*, 775 F. Supp. 502 (D. Conn. 1990) (prelitigation collection letter demanding over twice the amount of the debt); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992) (filing foreclosure actions in wrong venue); *Clark's Jewelers v. Humble*, 823 P.2d 818 (Kan. App. 1991) (letter to debtor care of attorney).

Attorney misconduct is more serious than collection agency misconduct. Indeed, the collection agency's most effective threat is to invoke an attorney in the collection process. *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60 (2d Cir. 1993); *Clomon v. Jackson*, 988 F.2d 1314 (2d Cir. 1993); *United States v. National Fin. Servs., Inc.*, 820 F. Supp. 228 (D. Md. 1993); *Masuda v. Thomas Richards & Co.*, 759 F. Supp. 1456 (C.D. Cal. 1991).

Consumer debtors, ordinarily unrepresented because of their financial circumstances or the cost of legal representation, are usually ignorant of their legal rights. They are defenseless when an attorney overreaches while using the power of the judicial system against them. Indeed, as

our complaint alleges, most consumers default. *See generally* Hillard M. Sterling & Philip G. Schrag, *Default Judgments Against Consumers: Has the System Failed?*, 67 Denver U.L. Rev. 357 (1990) (study of 15 defaulted defendants; only 3 had no possible defenses or counterclaims); David Caplovitz, *Consumers in Trouble: A Study of Debtors in Default* 191-224 (1974) (consumers who have defenses may not be effectively asserting them; see especially discussion at 219 n.29 and 223); Charles E. Clark, *Research in Law Administration*, 2 Conn. B.J. 211, 213 (1928) (of 2713 contract and foreclosure cases filed, 2511 were withdrawn, discontinued, defaulted or stipulated to judgment).

Lawyers can readily take advantage of defaulting consumers; a busy court system cannot interpose defenses for the unrepresented consumer. *Cf. Gordon v. Tufano*, 450 A.2d 852 (Conn. 1982) (court has no jurisdiction to raise usury issue if parties do not). Congress intended the FDCPA to have a prophylactic effect by encouraging private attorneys general to bring some balance to a one-sided situation.

> Aside from the possibility of suit under the [FDCPA], Wexler [an attorney] may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor. A defendant debtor appearing in court without an attorney would be unlikely to know he was not liable for fees and the judge might not catch Wexler's overreaching; if the defendant defaulted, the judgment would probably include the fees.

> One purpose of statutory damages is to create an incentive to obey the law. It appears Wexler needs an incentive either to pay more attention to the complaints he files, or, taking another view, to dissuade him from taking advantage of debtors who do not know their rights.

Strange, 796 F. Supp. at 1120.

In repealing the attorney exemption, Congress expressly found "that current law does not adequately protect consumers from attorney debt collection abuses," H.R. Rep. No. 405, *supra*, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 1758. Thus, Congress has already rejected the argument that Rule 11-type sanctions provide an adequate deterrent. In addition, as recently amended, Rule 11 provides virtually no deterrent at all in the context of consumer debt collection litigation. In the rare case when a consumer notices intentional debt padding, the attorney can simply withdraw the claim. Fed. R. Civ. P. 11(c). Debt padding is risk free, unless the FDCPA applies.

> Baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay. Even if the careless litigant quickly dismisses the action, the harm triggering Rule 11's concerns has already occurred. Therefore, a litigant who violates Rule 11 merits sanctions even after a dismissal. Moreover, the imposition of such sanctions on abusive litigants is useful to deter such misconduct. If a litigant could purge his violation of Rule 11 merely by taking a dismissal, he would lose all incentive to "stop, think and investigate more carefully before serving and filing papers." (Citation omitted.)

Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 398 (1990). Rule 11 sanctions are easily evaded.[16] The FDCPA is the only effective mechanism to deter such violations as the debt padding which occurred in this case. Most consumers default; in such cases there is no one to invoke Rule 11 sanctions or counter attorneys' overreaching. In any event, court rules do not substitute for or take precedence over Congress' decision to apply FDCPA liability to attorneys collecting consumer debts.

Ms. Jenkins submits that the limited remedies of § 1692k – actual damages (which may be difficult to prove, unless overcharges have been paid, *Baker*, 677 F.2d at 780-81), statutory damages up to $1,000, plus attorney's fees – are minimally necessary to better balance the scales of justice in the normally one-sided advantage an attorney has when suing a lay debtor. Apart from Ms. Jenkins' view, Congress has made that very determination. The arguments now advanced in opposition have no place in this forum in view of the contrary legislative judgment.

---

[16] Contrary to Petitioner's Brief at 20, Connecticut does not have a Rule 11 parallel. *Fattibene v. Kealey*, 558 A.2d 677 (Conn. App. 1989). Connecticut's Unfair Trade Practices Act cannot be used against an opposing attorney. *Jackson v. R.G. Whipple, Inc.*, 627 A.2d 374 (Conn. 1993). There is no cause of action for abuse of process. *Heck v. Humphrey*, 114 S. Ct. 2364, 2372 n.5 (1994) ("The gravamen of that tort is not the wrongfulness of the prosecution, but some extortionate perversion of lawfully initiated process to illegitimate ends"). A favorable result, even in a lesser amount than requested, negates malicious prosecution as a remedy. *Id.*

CONCLUSION

Ms. Jenkins respectfully requests that this Court affirm the decision below.

Respectfully submitted,

JOANNE S. FAULKNER
(Counsel of Record)
123 Avon Street
New Haven, Connecticut 06511
(203) 772-0395

DANIEL A. EDELMAN
EDELMAN & COMBS
135 S. LaSalle Street, Suite 1006
Chicago, Illinois 60603
(312) 739-4200

Richard J. Rubin
208 Griffin Street
Santa Fe, New Mexico 87501
(505) 984-1727

Attorneys for Respondent

Dated: January 17, 1995

STATEMENT OF REP. ANNUNZIO, 132 Cong. Rec. H10031 (daily ed. Oct. 14, 1986)

(typeface indicates "words inserted or appended, rather than spoken." *Id.* at H9943)

Mr. Annunzio. Mr. Speaker, on July 9, legislation repealing the attorney exemption to the Fair Debt Collection Practices Act became law. That legislation, which I introduced, requires that attorneys in the debt collection business comply with the law that protects consumers against abusive, deceptive, and unfair debt collection practices. The legislation was a direct response to the explosive growth in the number of law firms that had entered the debt collection business and were abusing the exemption the original Fair Debt Collection Practices Act provided. With the repeal of the exemption, attorneys in the debt collection business must comply with the act when they collect consumer debts.

The proliferation of attorney collectors has grown dramatically over the past several years, and an estimated 5,000 attorneys are now involved in debt collection. Repeal of the exemption was intended to place attorney collectors and lay collectors on an equal footing. It ensures that attorneys use fair debt collection tactics. It ensures that lay collectors, who are required by the act to refrain from using abusive tactics, are not competitively disadvantaged by the act.

Ethical attorneys need have no concerns about the impact of the act on their practice. The Fair Debt Collection Practices Act regulates debt collection, not the practice of law. Congress repealed the attorney exemption to the act,

not because of attorney's conduct in the courtroom, but because of their conduct in the backroom. Only collection activities, not legal activities, are covered by the act.

Not all attorneys are covered by the act. It does not apply to the collection of commercial debts. It applies only to those attorneys whose business has the principal purpose of the collection of debts or who regularly collect or attempt to collect dues to third parties. Attorneys, like any other persons who only irregularly or occasionally collect debts, are not covered.

Some attorneys have claimed that the act will restrict their ability to practice law. Nothing could be further from the truth. The Act applies to attorneys when they are collecting debts, not when they are performing tasks of a legal nature.

Suggestions that the repeal of the attorney exemption prohibits bringing legal action is an absurd reading of the act. The act only regulates the conduct of debt collectors, it does not prevent creditors, through their attorneys, from pursuing any legal remedies available to them.

Actions which can only be taken by those possessing a license to practice law are outside the scope of the act. The filing of a complaint is not covered by the act. Since it is not covered under the act, there is no requirement that attorneys include the notices required under section 809 of the act in legal filings. Further, there is no requirement that the attorney must provide verification of the debt as required under that section of the act in the context of legal proceedings. Since the attorney will be required to prove the validity of the debt as an element of the legal

proceedings, there is no need to require additional validation.

Repeal of the attorney exemption does not infringe upon the practice of law by attorneys. It does assure that consumers are protected from unfair and unethical debt collection practices, regardless of the profession of the collector.

10

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

REPLY BRIEF ON THE MERITS OF PETITIONERS GEORGE W. HEINTZ and BOWMAN, HEINTZ, BOSCIA & McPHEE

D. KENDALL GRIFFITH
Counsel of Record
GEORGE W. SPELLMIRE
BRUCE L. CARMEN
DAVID M. SCHULTZ
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Attorneys for Petitioners

HINSHAW & CULBERTSON
Of Counsel

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,
Petitioners,

v.

DARLENE JENKINS,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

REPLY BRIEF ON THE MERITS OF PETITIONERS
GEORGE W. HEINTZ and
BOWMAN, HEINTZ, BOSCIA & McPHEE

ARGUMENT

I.

HEINTZ' ARGUMENT IS CONSISTENT WITH THE QUESTION UPON WHICH CERTIORARI IS GRANTED.

Jenkins' brief opens with a question-begging challenge to jurisdiction. She argues that Heintz' admission that on some occasions he acts as a "debt collector" makes this a different case than the issue upon which certiorari was granted (Resp. br. at 7-8). It is only a different issue if

one views the Act's proscriptions as *ad hominem* rather than directed at the conduct at issue. The question certified asks whether an attorney (which Heintz was) engaged solely to prosecute a consumer debt lawsuit (as Heintz was) is subject to the Act. Apparently Jenkins reads the phrase "engaged solely to prosecute litigation" as meaning "engaged solely to prosecute litigation by all clients and on all occasions." The question in this case is whether, under the allegations of the complaint, Heintz was engaged in the collection of a debt when he wrote the letter to Jenkins' counsel. The question is *not* whether in some other cases, unrelated to the allegations in this complaint, Heintz acts as a debt collector. That issue only arises when the defendant argues that he does not *regularly* engage in the collection of debts, which would also exempt him from liability under 15 U.S.C. § 1692a.

II.

THE ACT'S REFERENCES TO LITIGATION DO NOT CLARIFY THE SCOPE OF THE TERM "DEBT COLLECTOR."

Jenkins argues that the Act, by its terms, was intended to apply to litigation. Jenkins confuses provisions restricting the simulation or threat of litigation with the actual prosecution of a lawsuit. Furthermore, in listing all these tangential references to litigation in the Act (Resp. br. at 14-16), Jenkins misses the operative point: all of these provisions were in the Act when attorneys were entirely exempt. Those provisions addressed what *debt collectors* cannot do with respect to debtors. These provisions do not address what attorneys do when litigating a case.

Jenkins' argument regarding the venue provisions in 15 § 1692i misses the point of that proscription. Its connection to "litigation" is the same as all the other tangential connections mentioned in Jenkins' brief. It addresses a specific harassing technique which debt collectors used to put financial pressure on debtors. It has nothing to do with the actual prosecution of consumer debt litigation, i.e., alleging facts in a complaint, preparing a case for trial and enforcing a judgment. It merely addressed an abusive forum choice.

Moreover, like all of the other provisions mentioned by Jenkins, it was enacted at a time when attorneys were exempt from the act. Congress meant to attack *collectors* who used this unsavory tactic. At any rate, its inclusion in the statute when attorneys were exempt does not support Jenkins' argument that the Act was always meant to address "litigation" as such, or at least as conducted by attorneys.

III.

THE LEGISLATIVE HISTORY PLAINLY SUPPORTS HEINTZ' INTERPRETATION OF THE ACT.

Jenkins' discussion of the plain meaning of the Act and its legislative history is all part and parcel of her *ad hominem* misconception of the Act. In footnote 7 on page 17 of her brief, Jenkins cites the distinction between attorneys who sporadically collect claims and those who regularly do, as if those who regularly collect debts are always subject to the Act regardless of the context in which their conduct takes place.

But this argument fails based upon the legislative history cited by Heintz in his original brief and Jenkins' own discussion of legislative history. Heintz' discussion of legislative history, consisting largely of Representative Annunzio's statements, shows that the attorney exemption repeal was *not* meant to brand lawyers as "debt

collectors" regardless of the context of their actions. Representative Annunzio could not have been clearer in establishing the distinction between attorneys acting as litigation attorneys and those doing what debt collectors ordinarily do. Nothing in these remarks suggests a "once a debt collector, always a debt collector" dogma.

Jenkins' own discussion of legislative history on page 17 proves Heintz' point. Her citation to the history addresses abusive *collection* techniques undertaken by attorneys (threats of litigation; simulation of litigation) which they could get away with merely because they were attorneys. These examples never discuss what attorneys do while prosecuting consumer debt litigation.

Jenkins argues that the passage of the Act over Representative Hiler's objections that it would inhibit attorney litigation-related activity shows that the amendment was meant to apply to the prosecution of litigation (Resp. br. at 18-19). Jenkins reads far too much into these comments. An equally plausible inference is that Congress did not think the amendment accomplished the things that Representative Hiler feared, so did not need to address his concerns. This inference is supported by hard evidence—Representative Annunzio's statements relating to the scope of the amendment—as opposed to the mere inference drawn by Jenkins.

All of the discussions in the House Report, quoted on pages 20-21 of Jenkins' brief, are silent with respect to the scope of the term "debt collector." These discussions—of limiting contact with debtors, stopping harassment and requiring validation of debts to avoid errors—addressed the actions of attorneys unrelated to the litigation process. These comments prove Heintz' point: Congress meant to regulate attorneys when they acted as debt collectors. Congress did not mean to regulate the activities of lawyers as litigators of disputed consumer claims.

Jenkins' discussion of the rejected proposals of the Commercial Law Leagues of America and the American Bar Association fails to persuade for the reasons previously asserted. Congress' refusal to provide a specific exemption for attorneys engaged in litigation does not mean that Congress considered litigation activity as "the collection of a debt." Instead, such a specific exemption was unnecessary in light of Congress' *expressed* concept of the scope of the phrase "collection of a debt." As Representative Annunzio stated on more than one occasion, the Act was not meant to inhibit lawyers engaging in the type of conduct in which Heintz engaged in this case.

Jenkins' objection to Heintz' reliance upon the views of Representative Annunzio and the FTC (Resp. br. at 23-26) also begs the question. The remarks of legislators and agency interpretations cannot vary the *unambiguous* language of a statute. But the phrases "debt collector" and "collection of a debt" are ambiguous as applied to the actions of a litigation attorney, in the context of a statute designed to regulate bill collectors and their law-licensed counterparts. The process of filing a case, preparing it for trial and executing upon the judgment through the courts does not fit hand-in-glove within the ordinary, plain meaning of the phrase "collection of a debt." As argued in the original brief, "collection of a debt" has a certain, undeniable plain meaning. But as applied to litigation activity, which is of a different character than the core object of the Act—the devious and menacing bill collector—it is not so clear. That is why this Court should not hesitate to investigate what Congress really meant to regulate when it deleted the attorney exemption.

Jenkins engages in a demagogic attack on the practice of "debt padding," as if this were the issue in this case. The issue in this case is not whether debt padding by a debt collector violates the Act—it clearly does. The question certified by this Court concerns whether Heintz was acting as a debt collector.

Jenkins' last paragraph on the subject of debt padding is quite confusing (Resp. br. at 29). She suggests that "under Heintz' view neither a collection agency nor an attorney could demand excessive charges outside litigation." That is not Heintz' view. If a debt collector demands a charge not authorized by the debtor's agreement with the creditor, he may violate the Act. If a creditor hires an attorney, who does the same thing in a dunning letter or telephone call to the debtor or the debtor's attorney, the attorney may violate the Act. But if an attorney is engaged by his client to collect a sum which is not authorized by the contract, the complaint he files is not subject to the Act. Rather, the attorney is subject to state law tort remedies or court-ordered sanctions if the litigation is frivolous or brought for the improper purpose of collecting a claim which the lawyer knows is improper. But there is nothing in the legislative history to suggest that Congress intended to burden litigation attorneys with a strict liability statute for filing a lawsuit which the client advises is consistent with the debtor's contractual obligations. The legislative history suggests the precise opposite, as evidenced by Representative Annunzio's statements.

Much of the remainder of Jenkins' brief is a polemic against the supposed evil inflicted upon her and other consumers by collection attorneys. Mixed in with that attack is yet another distortion of the plain meaning of the legislative history of the repeal of the attorney exemption. Jenkins cites from the House Report "the current law does not adequately protect consumers from attorney *debt collection* abuse (emphasis added)." Note that the report does not say "attorney abuse" or "lawsuit abuse" or "collection litigation abuse." Rather, the statement must be viewed in the context of the whole report, which addresses the problem of attorneys' doing the same things as ordinary debt collectors, but evading liability due to their blanket exemption.

In summary, Congress sought to address a specific evil when it eliminated the complete exemption of attorneys from the definition of "debt collector." The legislative history and administrative interpretation of this amendment answer the question that the definition of "debt collector" leaves open: Congress did not intend the Act to apply to attorneys whose sole function was to prosecute a lawsuit and reduce a consumer debt to judgment. The legal system already imposes significant punishment for abusive litigation conduct; consequently, there is no need to extend the definition of "debt collector" to activity it was not intended to cover.

CONCLUSION

For these reasons, petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit, and reinstate

the judgment of the United States District Court for the Northern District of Illinois.

Respectfully submitted,

D. Kendall Griffith
Counsel of Record
George W. Spellmire
Bruce L. Carmen
David M. Schultz
222 North LaSalle Street
Suite 300
Chicago, Illinois 60601-1081
(312) 704-3000

Attorneys for Petitioners

Hinshaw & Culbertson
Of Counsel

Dated: February 13, 1995

(5)

No. 94-367

In the Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ AND BOWMAN,
HEINTZ, BOSCIA & MCPHEE, *Petitioners*,

v.

DARLENE JENKINS, *Respondent*

**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

GEORGE E. BUSHNELL*
President
American Bar Association
750 Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

JOHN SHEPARD WILEY JR.
CHARLES A. ROTHFELD
Counsel for Amicus Curiae
**Counsel of Record*

11pp

QUESTION PRESENTED

Amicus will address the following question:

Whether an attorney responsible for the prosecution of litigation should be treated as a debt collector under the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-367

GEORGE W. HEINTZ AND BOWMAN,
HEINTZ, BOSCIA & MCPHEE, *Petitioners*,

v.

DARLENE JENKINS, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

Amicus American Bar Association (ABA) is a private, voluntary professional organization of lawyers. *See Public Citizen v. Department of Justice*, 491 U.S. 440, 443-44 (1989). The ABA's mission is to represent the legal profession nationally, serving the public and the profession by promoting justice, professional excellence, and respect for the law. The ABA has developed ethical standards for lawyers that nearly all states have adopted. In 1908, the ABA promulgated the CANONS OF PROFESSIONAL ETHICS; in 1969,

the MODEL CODE OF PROFESSIONAL RESPONSIBILITY; and in 1983, the MODEL RULES OF PROFESSIONAL CONDUCT. These ethical standards address the nature of the attorney's duty of advocacy. The decision below potentially affects this duty to the detriment of both attorney-client relationships and the administration of justice. The ABA Board of Governors resolved on November 8, 1985 to oppose legislation removing the attorney's exemption from the Fair Debt Collection Practices Act. These ABA policies and concerns prompt this brief.[1]

SUMMARY OF ARGUMENT

The Fair Debt Collection Practices Act (FDCPA or Act) regulates "debt collectors." The decision below applied these regulations to an attorney responsible only for the preparation and prosecution of litigation. (By "lawyer" or "attorney," this brief means lawyers responsible only for the preparation and prosecution of litigation, and not lawyers who work as traditional debt collectors making dunning calls and the like.) So interpreted, the FDCPA creates two unfortunate consequences that affect lawyers representing creditors. First, the Act exposes these lawyers to strict personal liability for bringing "any action that cannot legally be taken." Lawyers may violate this FDCPA provision by pursuing claims that are well founded, but that ultimately do not prevail. This risk of strict personal liability will make lawyers reluctant to bring even claims that are meritorious, because meritorious claims sometimes lose. A law that makes lawyers shrink from vigorously representing their clients will damage attorney-client relationships and the administration of justice in this field.

[1] The parties' letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3 of the Rules of this Court.

Second, the Act exempts "debt collectors" who do not "regularly" collect debts. If applied to lawyers, this provision would exempt less experienced or specialized attorneys from regulation and liability because these lawyers have not "regularly" collected debts. A law that tends to channel clients away from specialized but regulated lawyers toward inexpert but unregulated counsel offends society's interest in seeing the public served by those with experience and ability. It seems unlikely that Congress intended its debt regulation law to have such remote and unwarranted effects.

ARGUMENT

The FDCPA regulates "debt collectors." The decision below applied the FDCPA's regulations to a lawyer engaged solely in litigation. Applying the FDCPA to lawyers who regularly represent creditors can deter zealous advocacy in this field; can impede access to justice; and can reduce the quality of professional service. These mischievous effects can arise in two different ways.

1. By the logic of the interpretation below, the FDCPA would impose personal liability on lawyers if they threaten "to take any action that cannot legally be taken . . . ." 15 U.S.C. section 1692e(5). This quoted language appears to reach creditors' lawyers who sue consumer debtors on claims that in some respect ultimately fail. As the Sixth Circuit stated, "[a]ssuming a lawsuit is brought, and the consumer prevails to any extent, it would appear that the law has been broken, as the creditor threatened to take action that apparently, as a result of the judgment, 'cannot legally be taken.'" *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993) (quoting FDCPA § 1692e(5)). The lawyer then would face personal liability for the failed action, liability that includes statutory damages and attorneys fees. 15 U.S.C. § 1692k(a)(2)(A) & (3). Thus interpreted, the FDCPA imposes strict personal liability upon lawyers when hindsight shows

that the claims of their clients were less than totally successful.

This FDCPA standard differs markedly from the governing ethical and procedural standard. The relevant standard requires lawyers to be prepared to "further the interests of [their] clients by all lawful means . . . ." *In re Griffiths*, 413 U.S. 717, 724 n.14 (1973); *see* MODEL RULES OF PROFESSIONAL CONDUCT Preamble [2] & Rule 1.3 cmt. 1 (1994). The attorney's overriding ethical duty is to represent clients with zeal, and to be willing to bring any *meritorious* claim for them. The ethical limit on zealous advocacy thus allows all claims that are "not frivolous." *Id.* RULE 3.1; *accord*, FED. R. CIV. P. 11(b)(2) (no Rule 11 liability so long as arguments are "nonfrivolous"); *compare Green*, 9 F.3d at 22 ("[the FDCPA's] system of strict liability . . . conflicts with the current system of judicial regulation [under Rule 11]").

Interpreting the FDCPA to penalize unsuccessful litigation would inhibit properly zealous advocacy. Like everyone else, lawyers prefer to avoid potential personal liability. If the possibility of losing creates the threat of personal liability, lawyers for creditors will hesitate to file claims that might lose, which includes most claims. Few rules of law are certain in all respects. Few factual allegations can be made without risk of rebuttal. This interpretation of the FDCPA thus can deter even meritorious claims. If the FDCPA penalizes litigation failures, then, it will deter even claims for creditors that clearly should win — but might not.

To deter advocacy for creditors is to undermine attorney-client relationships and the administration of justice. Lawyers aware of their own personal exposure will become searchingly skeptical of their clients' cases. Caution will supplant vigor. This skepticism and caution will not escape the notice of clients. It will corrode the trust essential to the

professional relationship. And the FDCPA will do more than simply hammer a wedge between lawyer and client. Ultimately this reading of the FDCPA will hinder access to justice itself. All creditors, including those with meritorious cases, will have a harder time hiring responsible lawyers. When lawyers systematically shrink from vigorously representing creditors and their valid claims, injustice will be the result.

2. The FDCPA's wording threatens to create another harm to the ethical practice of law if courts define "debt collectors" to include lawyers responsible for the preparation and prosecution of litigation. The Act regulates debt collectors only when they "regularly" collect debts, or when their business has the "principal purpose" of debt collection. 15 U.S.C. § 1692a. Occasional debt collectors thus are exempt from the FDCPA. *See* S. REP. NO. 382, 95TH CONG., 1ST SESS. 3 (1977) ("[t]he requirement that debt collection be done 'regularly' would exclude a person who collects a debt for another in an isolated instance"). If applied to lawyers, this provision would tend to discourage creditors from hiring lawyers whose specialization makes them "regular" debt collectors subject to liability under the Act. The exception would make lack of specialized litigation experience into a virtue, because lawyers who have not "regularly" collected debts remain unregulated and cannot incur liability under the Act. Applying the FDCPA to lawyers thus would tend to deprive creditors of the benefits of stable long-term relations with expert attorneys. This unfortunate result would not be in the public interest.

3. In the *Green* opinion, the Sixth Circuit documented other ways in which applying the FDCPA's rules to the normal procedure of litigation "would produce absurd outcomes." 9 F.3d at 21. Inquiring about absurd outcomes is a proper way to construe a statute, despite a contrary suggestion in the decision below. The court below disagreed with the Sixth Circuit's ultimate interpretation of the Act in

Green. But the court below acknowledged that, "[a]s the Sixth Circuit noted, there *are* conceivable problems with regulating attorneys in their debt collection efforts." *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994) (emphasis added). The Seventh Circuit did not investigate these problems, stating that "our analysis of the statute ends with its language; we do not reach the legislative history." *Id.* (emphasis added). The Sixth Circuit's analysis of absurd outcomes in the *Green* case, however, did not resort to legislative history. Rather, the Sixth Circuit construed the words of the FDCPA itself. This method of statutory construction is conventional and correct. "Surely one of the most frequent justifications courts give for choosing a particular construction is that the alternative interpretation would produce 'absurd' results . . . ." Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515; *cf. United States v. X-Citement Video, Inc.*, No. 93-723, slip op. 3 (Nov. 29, 1994) (Court will not assume Congress intended absurd results) (citing authorities). It therefore is proper to consider whether a proposed statutory reading will lead to bizarre consequences.

4. It seems improbable that Congress wanted its regulation of debt collectors to subvert any lawyer's role as faithful and active advocate. This Court should doubt that Congress intended to handicap anyone's access to justice, or to prompt creditors to avoid stable relations with expert lawyers.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted.

GEORGE E. BUSHNELL*
President
American Bar Association
750 Lake Shore Drive
Chicago, IL 60611
(312) 988-5000

JOHN SHEPARD WILEY JR.
CHARLES A. ROTHFELD
Counsel for Amicus Curiae
**Counsel of Record*

DECEMBER 1994

6

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ, ESQUIRE; AND
BOWMAN, HEINTZ, BOSCIA & MCPHEE,
PETITIONERS,

V.

DARLENE JENKINS,
RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONERS

RONALD S. CANTER, ESQ.*
7272 Wisconsin Ave., 4th Fl.
Bethesda, MD 20814-4838
(301) 951-8500
Counsel for Amicus Curiae
National Assoc. of Retail Collection Attorneys

Of Counsel
RONALD M. ABRAMSON, ESQ.
7272 Wisconsin Ave., 4th Fl.
Bethesda, MD 20814-4838

ROSALIE B. LEVINSON, ESQ.
122 West 79th Avenue
Merrillville, IN 46410
Counsel for Amicus Curiae

*Counsel of Record

29 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE *

The National Association of Retail Collection Attorneys (NARCA) is a non-profit trade association organized to promote the image and function of attorneys practicing in the fields of collection of consumer debt, creditors rights and creditor representation in bankruptcy proceedings. NARCA seeks to elevate ethical standards and improve the practice of law by creditor attorneys.

Formed less than two (2) years ago, NARCA has experienced remarkable growth. Presently, NARCA's membership includes more than 730 law firms practicing in 49 of the 50 states. Law firms which have devoted at least 25% of their practice to the field of consumer collections for the past five (5) years are eligible for membership. NARCA requires all member firms to certify that they are not subject to any attorney disciplinary proceedings.

NARCA serves its members through educational programs, including seminars on the Fair Debt Collection Practices Act (FDCPA). In the short time since NARCA was formed, it has sponsored four (4) major national conventions attended by its member attorneys as well as business representatives from the credit community. Because NARCA members regularly practice in the field of consumer collections and pursue collection of accounts outside of litigation, they are subject to the FDCPA.

NARCA urges reversal of the Court of Appeals for the Seventh Circuit in this case because a broad application of FDCPA provisions to attorneys engaged in litigation could impose liability on collection attorneys in situations where the attorney acts in good faith as a client's advocate.

* The consent of the Petitioner and Respondent to the filing of this Brief are attached in the Appendix.

SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Seventh Circuit erred by expanding the Fair Debt Collection Practices Act (hereinafter referred to as the "FDCPA" or the "Act") to include litigation activities performed by attorneys. Although attorneys performing traditional non-litigation activities were included within the coverage of the Act in 1986, neither the language of the Act nor its purpose, to regulate unscrupulous non-litigation conduct of debt collectors, allows for an interpretation so broad so as to include litigation activities.

By applying the well established statutory construction rule of examining a statute as a whole to the instant case, it is evident that only a single provision of the Act, the forum abuse provision found in 15 U.S.C. § 1692i, applies to litigation activities. The Seventh Circuit failed to examine the statute as a whole, and in its analysis interpreted a single provision of the statute in a vacuum resulting in a reading inconsistent with the Act's language and purpose.

However, even if the Act when examined in its entirety is interpreted to apply to litigation activities, this Court should look beyond the literal language of the Act into its purpose and intent due to the absurd results which would result. For instance, if the Act were interpreted to govern litigation activities, a debtor could stop a trial in its tracks by invoking 15 U.S.C. § 1692c(c) requiring all communication with a debtor to cease at his or her request. If the Act were interpreted to govern litigation activities an attorney would be precluded from presenting their client's case to the court due to the prohibition on communicating with third parties. 15 U.S.C. § 1692c. And finally, if litigation activities were included within the Act's confines, the Federal Trade

Commission would be empowered to issue cease and desist orders in the midst of litigation, a violation of the separation of powers doctrine.

The FDCPA was designed to eliminate abusive conduct of debt collectors outside of the litigation arena where consumers can be victimized. But the judicial system has established adequate protections and recourse for aggrieved debtors should an attorney act improperly during the course of litigation. To apply the FDCPA to litigation activities skews the purpose and language of the Act, ignores the sponsor's intent and completely alters the manner in which the judicial system currently operates.

ARGUMENT

I. THE FAIR DEBT COLLECTION PRACTICES ACT SHOULD NOT BE JUDICIALLY EXPANDED BEYOND ITS PROVISIONS TO REGULATE ATTORNEYS ENGAGED IN LITIGATION.

INTRODUCTION

In 1977, Congress passed the Fair Debt Collection Practices Act in response to "abundant evidence of the use of abusive, deceptive and unfair debt collection practices." 15 U.S.C. § 1692(a). These practices included late night phone calls to debtors, use of obscene language, threats of imprisonment, and the use of false and misleading representations in collecting consumer debts. Congress declared the statute's purpose was "to eliminate abusive debt collection practices, to insure that debt collectors who refrain from abusive practices are not competitively disadvantaged, and to promote consistent action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e).

Initially, the FDCPA exempted attorneys who engaged in debt collection. However, in 1986 the Act was amended by Congress through repeal of the attorney exemption[1] in light of evidence that attorney debt collectors were soliciting business by touting their exemption from the Act and were engaging in practices which would otherwise be prohibited

[1] Fair Debt Collection Practices Act, Pub. L. No. 99-361, 100 Stat. 768 (codified as amended at 15 U.S.C. § 1692a)

under the FDCPA. H.R. REP. NO. 405, 99th Cong., 2d Session, 5 (1986) *reprinted in* 1986 U.S.C.C.A.N. 1756. The repeal of the attorney exemption ensured that all firms in the business of debt collection "abide[d] by the same rules." *Id.* The sponsor of the legislation repealing the exemption, Rep. Frank Annunzio, made it abundantly clear that the FDCPA "only affects conduct in the backroom, not the courtroom."[2]

A. THE SEVENTH CIRCUIT ERRONEOUSLY EXPANDED THE FAIR DEBT COLLECTION PRACTICES ACT BY CREATING LIABILITY ON ATTORNEYS ENGAGED IN LITIGATION ACTIVITIES

In the instant case, the Seventh Circuit expanded the breadth and reach of the FDCPA into a forum which it was never intended to regulate - the judicial system. The court below held that an attorney who files a civil complaint on behalf of a client and who subsequently corresponds with the defendant's attorney is subject to liability under 15 U.S.C. § 1692f(1) for collecting a debt through false and misleading representations if the debtor proves that <u>any</u> amount sought is not "expressly authorized by the agreement creating the debt or permitted by law."[3] This overreaching decision imposes strict liability on any attorney whose client sued for a sum greater than the amount actually awarded by the court after trial. *Contra, Green v. Hocking*, 9 F.3d 18, 22 (6th Cir.

[2] 132 CONG. REC. 10,031 (1986).

[3] *Jenkins v. Heintz*, 25 F.3d 536, 539 (7th Cir. 1994).

1993), in which the Sixth Circuit declared it was "unwilling to impose a system of strict liability that conflicts with the current system of judicial regulation."

Under the Seventh Circuit's interpretation of the Act, a judgment for any amount less than what was sought, even a verdict reduced by one dollar ($1.00), may result in an FDCPA action against the creditor's attorney who filed the suit. An FDCPA suit subjects the creditor's attorney to $1,000.00 in statutory damages, plus any actual damages, plus attorney's fees incurred by the debtor,[4] the sums of which may geometrically exceed the credit or offset awarded to the debtor by the trial court. The Seventh Circuit's strained reading of the Act would mandate this absurd result because if, as the court below suggests, all provisions of the FDCPA must be literally interpreted, the FDCPA must apply to attorneys engaged in litigation as well as non-litigation debt collection activities.

In construing separate provisions of the FDCPA far out of context, the court below failed to follow the well established statutory construction rule, as recently restated by this Court in *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991), that a statute must be read as a whole regardless of the clarity of a particular provision since "the meaning of statutory language, plain or not, depends on context." In *King*, this Court refused to read into the Veterans' Reemployment Rights Act a time limitation of civilian reemployment for employees entering military service where none was expressly stated. Although the remainder of the statute contained provisions granting up to five (5) years of job protection, 38 U.S.C. § 2024(d) did not. Where the

[4] 15 U.S.C. § 1692k.

statute was "utterly silent" as to a time limitation, this Court refused to read one into it and allowed employees invoking this provision unlimited job protection. *King*, 112 S. Ct. at 573. "In so concluding we do nothing more, of course, than follow the cardinal rule that a statute must be read as a whole." *Id.* at 574. *See also, U.S. Nat'l Bank of Oregon v. Indepen. Insur. Agents of America*, 113 S. Ct. 2173, 2182 (1993) holding that "in expounding a statute, [the Court] must not be guided by a singular sentence, . . . but [must] look to the provisions as a whole, and to its object and policy."

Similarly, in the instant case, with the exception of a single provision, found at 15 U.S.C. § 1692i, which limits the venue of debt collection suits, the FDCPA is utterly silent as to application of the remainder of its provisions in the litigation arena. Without the type of express provision governing litigation found at 15 U.S.C. § 1692i, this Court should refuse to implicitly read one into the remainder of the FDCPA. In *King*, this Court refused to read into a single provision time limitation language found in the remainder of the statute. In the instant case, language addressing litigation is found only in a single provision and should not be read into the remainder of the FDCPA. Although the instant case presents the reverse situation found in *King*, the guiding principle is the same - express language in one provision should not be implicitly read into other sections of a statute.

The Seventh Circuit ignored this vital rule of statutory interpretation by reading a single provision of the FDCPA and applying it out of context to the litigation process. The FDCPA was never intended, nor written, to govern litigation activities. By undertaking an examination of the FDCPA as a whole, its guiding principles become evident. First, the Act

practices..." amid evidence of deceptive and unfair means utilized to collect debts. 15 U.S.C. §§ 1692(a) & (e). The purpose clause makes no mention of regulating conduct in the courtroom. A contrast is therefore evident between regulating "debt collection practices" under the FDCPA and non-covered litigation aimed at obtaining a judgment for a past due obligation.

Second, the substantive provisions of the statute contain only a single provision relating to litigation - the forum abuse provision found in § 1692i.[5] Most significantly, the provision is entitled "Legal actions by debt collectors" and in pertinent part states that "Any debt collector who brings any legal action on a debt against any consumer shall - (2)...bring such action only in the judicial district or similar legal entity - (A) in which such consumer signed the contract sued upon; or (B) in which the consumer resides at the commencement of the action." 15 U.S.C. § 1692i. This section is the only one in the Act which addresses litigation activities conducted by debt collectors.

No other provisions of the Act prescribe conduct in the litigation arena, where litigants are already protected by comprehensive court rules and procedures designed to ensure fair and impartial hearings. The other FDCPA prohibitions are directed at unsavory tactics and wholesale abuses by debt

---

[5] The forum abuse standard is based on "the fair venue standard" adopted by the Federal Trade Commission., *See*, S. REP. NO. 382, 95th Cong., 1st Sess. 2, (1977) *reprinted* in 1977 U.S.C.C.A.N. 1699. *See also*, *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976), upholding an FTC finding that mail-order catalogue business engaged in an unfair trade practice by suing all customers in Cook County, Illinois, regardless of the residence of the customer, despite the creditor's arguable claim of long-arm jurisdiction.

collectors in dealing with debtors outside of the litigation process where debtors lack the benefit of judicial protections.

The remainder of the Act contains specific non-litigation protections and prohibitions. It outlaws abusive, deceptive and unfair practices and imposes mandatory disclosure requirements. 15 U.S.C. § 1692g requires a debt collector to send a written notice to the debtor within five (5) days of an initial communication with the consumer setting out the consumer's rights to request validation of the debt. In addition, to guard further against misleading communications, 15 U.S.C. § 1692e(11) requires a disclosure in each communication with a debtor that the purpose of the communication is "to collect a debt and that any information obtained will be used for that purpose."

Further, the Act limits permissible communications with the debtor and third parties under 15 U.S.C. §§ 1692b and 1692c. Harassment or abuse, false or misleading representations and unfair debt collection practices are also prohibited under 15 U.S.C. §§ 1692d, e and f. Finally, the statute prohibits the use of misleading forms. 15 U.S.C. § 1692j.

By narrowly focusing on 15 U.S.C. § 1692f and molding the statute into a litigation control device, the Seventh Circuit erred by failing to take into account the statute as a whole. The lower court erroneously extended the reach of the FDCPA well beyond the holdings in *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992) and *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994). In those cases, the Fourth and Ninth Circuits merely held attorneys who file debt collection lawsuits to the same venue standards as lay debt collectors. However, 15 U.S.C. § 1692i is the only provision governing litigation. By judicial fiat, the

Seventh Circuit found that the remainder of the Act applies to litigation activities despite the absence of language indicating such an expansive reading of the Act, and contrary to the sponsor's clearly stated intent.

B. THE FDCPA AS A WHOLE IS DESIGNED TO CURB ABUSES WHICH EXIST OUTSIDE OF THE PROTECTIONS INHERENT IN THE JUDICIAL PROCESS.

It is evident that when examined in its entirety, the FDCPA focuses on prohibitions such as harassment or abuse, false or misleading representations and unfair practices, all of which are unscrupulous acts by debt collectors outside of litigation. To apply these provisions to attorneys who have been retained to enforce the legal rights of their clients during the course of litigation results in nothing less than what the Sixth Circuit has termed an "absurd outcome." *Green v. Hocking*, 9 F.3d at 21.

Harassment or abuse outside of the protections inherent in the judicial system can be intimidating and overwhelming to the debtor. The FDCPA defines harassment or abuse as conduct "the natural consequence of which is to harass, oppress or abuse any person in connection with the collection of a debt." The Act lists six (6) specific forms of harassment including; threats of violence, use of obscene language, publication of "deadbeat" lists, offers to sell debts to coerce payment, placing of repeated telephone calls, and making telephone calls without properly identifying the caller. 15 U.S.C. § 1692d. These excesses would tend to coerce payment from a vulnerable debtor, and accordingly apply in the same manner to attorneys and lay debt collectors engaging in non-litigation collection activities.

Such conduct, however, stands in stark contrast to a situation where a debtor receives a summons to appear in court at a convenient location. The debtor has the opportunity to appear in court, to air any dispute before a neutral tribunal, and to require the creditor's attorney to meet their client's burden of proof to establish that the debt is owed.

The FDCPA also punishes false and misleading conduct which deceives or misleads the consumer into paying the debt based on false representations that the collector has taken specific legal steps.[6] But a lawyer who files a lawsuit is constrained to abide by court rules of practice and procedure designed to give each party an equal chance to produce evidence and testimony. Moreover, there are "elaborate controls on lawyers' conduct through the Rule 11 process or through similar state court procedures." *Green v. Hocking*, 9 F.2d at 22.

The unfair collection practices proscribed by 15 U.S.C. § 1692f are also aimed at curbing other non-litigation abuses, such as collection of "more than is legally owing,"[7] misuse of post-dated checks and making unauthorized collect calls. These prohibitions would also reach attorneys outside of litigation.

The Seventh Circuit erred and misinterpreted 15 U.S.C. § 1692f(1) by holding that an attorney "collects" an amount not permitted by law by merely filing suit on behalf of a client who may ultimately be awarded less than the

---

[6] 15 U.S.C. § 1692e prohibits many false representations as to: (2) the legal status of the debt, (3) whether the collector is an attorney, (4) the legal basis for seizure of the debtor's property, (5) whether a suit will be filed, (9) the official status of a document, and (13) whether a summons is genuine.

[7] S. REP. NO. 382, 95th Cong., 1st Sess. 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1698.

amount sought in the complaint. However, the true purpose of 15 U.S.C. § 1692f, when considered in context, bans practices used outside the scope of litigation. For example, payment by a post-dated check, in connection with a court approved settlement or in consideration of a voluntary dismissal of a pending suit, is quite different than where a collector makes unlawful threats of criminal prosecution to induce payment by a post-dated check. This is why Congress did not expressly include litigation practices in these kinds of FDCPA prohibitions - because the judicial system exists as a truth-finder in resolving civil disputes and already provides protections against false and deceptive practices.

By reading certain provisions of the FDCPA out of context, the Seventh Circuit has unilaterally re-focused state judicial rules and procedures and accordingly placed enormous constraints and penalties on attorneys who represent clients in debt collection proceedings. In litigation, the plaintiff/creditor bears the burden of proof to establish its claim. If there is insufficient proof, the debtor will prevail.

Moreover, there are numerous judicial protections in place to ensure the integrity of the process. If a creditor or its attorney brings a claim without adequate cause, with no merit or with the intent to delay, hinder or harass the debtor, sanctions are available to the debtor. *See, e.g.* FED. R. CIV. P. 11 and Illinois Supreme Court Rule 137 (134 Ill.2d R. 137). Moreover, if the creditor or attorney pursues a fraudulent claim or engages in abusive litigation conduct, common law causes of action are available to the debtor, including abuse of process and malicious prosecution.

At first glance, it may not seem unreasonable to apply a particular provision of the FDCPA to punish alleged deceptive conduct by an attorney in litigation. However, this Court must resist the inclination to find in the Respondent's favor merely on account of the egregious attorney misconduct alleged in the Complaint - namely, that the Petitioners

knowingly filed suit for excessive amounts. If this Court holds that the FDCPA governs certain litigation conduct, an attorney litigating consumer debts would be left to speculate whether other FDCPA provisions, including those imposing liability regardless of fraudulent or deceptive intent, would apply to litigation. For example, 15 U.S.C. § 1692e(5) outlaws threats of actions which "cannot legally be taken." "Assuming a lawsuit is brought, and the consumer prevails to any extent . . . the law has been broken as the (attorney) threatened to take action that . . . as a result of the judgment, 'cannot be legally taken.'" *Green v. Hocking*, 9 F.2d at 21. This newly, judicially re-written FDCPA would bring nothing less than chaos to a legal system which strikes a fair balance between the rights of litigants and the efforts to seek the truth.

This Court can also rest assured that the Respondent herein already has adequate common law and judicial remedies available to recover against an attorney who knowingly engages in wrongful conduct in connection with litigation. *See, e.g. Burnap v. Marsh*, 13 Ill. 535 (1852), where the Illinois Supreme Court held an attorney liable for malicious prosecution in knowingly pursuing a client's illegal motive by causing a debtor's wrongful arrest.

Application of the FDCPA to lawyers engaged in litigation tortures the meaning and focus of the Act. A debtor can be easily victimized outside of court. Once the debt is subject to suit, however, the protections afforded by the judicial system ensure against abuse. Congress saw fit to regulate the venue of collection actions to make sure each debtor could easily travel to court for trial. The FDCPA makes no other mention of legal action. This Court should reverse the Seventh Circuit's decision imposing liability on attorneys in litigation.

II. A LITERAL APPLICATION OF THE FDCPA TO LAWYERS ENGAGED IN LITIGATION WOULD PRODUCE ABSURD AND UNINTENDED RESULTS.

A. ABSURD RESULTS FOLLOW FROM A LITERAL APPLICATION OF THE FDCPA TO LITIGATION CASES.

Even if this Court were to conclude that an examination of the statute as a whole results in a reading consistent with the Seventh Circuit's ruling, the Court should look beyond the plain language of the statute and into the intention of the drafters if a literal application of the statute produces absurd results. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235 (1989). In that case, this Court addressed the question of whether post-petition interest on an over-secured pre-petition tax lien was allowable under 11 U.S.C. § 506(b) where the lien was non-consensual in nature. This Court looked beyond the literal language of the statute, noting that in circumstances where the result is at odds with the drafters' intent and would result in an absurdity, the intent rather than the strict language of the legislation controls. Accordingly, this Court held that consensual and non-consensual liens would be treated similarly under the law. *See also, U.S. v. X-Citement Video, Inc.*, 1994 U.S. LEXIS 8601, at *5 (U.S. Supreme Court) (rejecting literal, natural, grammatical reading of Protection of Children Against Sexual Exploitation Act where such a reading would produce anomalous and absurd results).

Likewise, in the instant case, the result of so broadly interpreting the FDCPA and applying it within the confines of litigation leads to a myriad of unintended and illogical results described herein. One of the important consumer protections contained within the framework of the FDCPA

provides that a debt collector must cease further communication with the debtor upon written request. 15 U.S.C. § 1692c(c). A communication is defined as "the conveying of information regarding a debt directly or indirectly to any person through any medium." 15 U.S.C. § 1692a(2). (Emphasis supplied).

If this provision of the FDCPA is applied to lawyers engaged in litigating consumer debt cases, a consumer, either through counsel or *pro se*, could demand that the attorney cease communication concerning collection of the debt. The lawyer would then be precluded from filing further pleadings, conducting a deposition of the debtor, and cross-examining the debtor during trial.[8] It is illogical to think that Congress intended such a result.

Taken one step further, "(i)f an attorney writes a first letter, and the consumer asks that communication cease, it would be unlawful to instigate a lawsuit." *Green v. Hocking*, 9 F.2d at 21. This absurd result inextricably leads to the logical explanation that the FDCPA was never intended to regulate lawyers engaged in litigation, and in fact this explanation was given by the Act's sponsor.

Further, the Act also prohibits a debt collector from communicating with third parties concerning the debt except to acquire "location information." 15 U.S.C. §§ 1692b, 1692c(b). During the course of litigation attorneys regularly communicate with third parties including juries, judges, clerks and bailiffs. This would be prohibited if the non-litigation sections of the FDCPA were construed to apply to

---

[8] Ironically, the creditor could hire a third party attorney who does not regularly collect consumer debts to continue litigation of the claim. Unlike the debt collection attorney, the substitute attorney is exempt from FDCPA liability, even if the attorney maliciously pursues unfounded claims. This untoward and irrational result discriminates against attorney debt collectors and raises the spector of a violation of the Equal Protection Clause of the Fourteenth Amendment.

litigation activities. Moreover, if a witness or document subpoena is requested, information concerning the lawsuit, and concomitantly the debt, is conveyed to the recipient of the subpoena. It is unimaginable to think that the FDCPA was ever intended to restrict such permissible communications to third parties in the context of litigation.

If this Court holds that the FDCPA regulates all facets of the litigation process, the administrative agency charged with enforcement of the Act, the Federal Trade Commission, would be duty-bound to enforce its provisions against attorneys involved in litigation pursuant to authority granted by 15 U.S.C. § 1692l(a).[9] The FTC's administrative power under the FDCPA is exercised through the Federal Trade Commission Act and empowers the agency to issue cease and desist orders restraining unfair trade practices and to impose civil penalties on offending parties pursuant to 15 U.S.C. § 45. *See, e.g. U.S. v. ACB Sales and Service, Inc.*, 683 F. Supp. 734 (D. Ariz. 1987). This broad authority could conceivably be exercised to restrain attorneys engaged in litigation and undermine an attorney's ability to effectively represent a client in court.

Such a broad exercise of executive power over attorneys engaged in litigation would substantially interfere with and usurp the exclusive authority of the judicial branch of government to regulate the practice of law. *See generally*, *Ex parte Robinson*, 86 U.S. (19 Wall) 505 (1873) (the power

---

[9] Current FTC enforcement policy provides that attorneys that engage in traditional debt collection activities are covered by the FDCPA, but lawyers whose practice is limited to legal activities are not. Statement of General Interpretation: Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed. Reg. 50,097, 100 (1988). This enforcement policy, while not binding on the Court, is nonetheless persuasive. *See, e.g.*, *Chevron U.S.A. v. Natural Defense Council*, 467 U.S. 837 (1984). This enforcement position would become obsolete if this Court ruled that the FDCPA governs attorneys involved in litigation.

to sanction and discipline attorneys is possessed by all courts having the authority to admit attorneys to practice); and *Theard v. United States*, 354 U.S. 278 (1957) (reciting basic tenent of judicial control over the conduct of attorneys).

B. APPLICATION OF THE FDCPA TO LAWYERS ENGAGED IN LITIGATION WOULD RENDER UNINTENDED RESULTS BY SIGNIFICANTLY ALTERING THE ATTORNEY-CLIENT RELATIONSHIP AND THE PRACTICE OF LAW.

Congress never intended for the FDCPA to affect attorneys representing their clients during the course of litigation. As stated by Rep. Frank Annunzio, the sponsor of the legislation, "[t]he removal of the attorney exemption will not interfere with the practice of law by the nation's attorneys. It will not prevent them from representing the interests of their clients. It will not subject them to onerous regulation." 131 CONG. REC. H. 10535 (daily ed. Dec. 2, 1985). However, the Seventh Circuit, in its ruling, completely ignored congressional intent and leapfrogged to the conclusion that "the Act reaches lawyers engaged in litigation." *Jenkins*, 25 F.3d at 539. That reach is broad and comprehensive.

Virtually all attorneys engage in some debt collection activities. The expansive definitions of a "consumer debt" and a "debt collector" under the Act includes the country lawyer collecting overdue accounts for the local fuel oil company, the small firm pursuing patient accounts for a neighborhood physician and the large firm doing collection work for its banking client. 15 U.S.C. §§ 1692a(5) and (6).

An attorney is deemed a debt collector under the FDCPA if the lawyer "regularly collects or attempts to collect debts . . . owed . . . to . . . another." 15 U.S.C. §

1692a. The regular collection of debts need not comprise any substantial portion of a lawyer's practice. A law firm whose debt collection practice is only 4% of its business is subject to the Act. *See, Stojnaovski v. Stroble and Manoogian, P.C.*, 783 F. Supp. 319 (E.D. Mich. 1992). Only where an attorney handles debt collection matters on a rare basis, such as less than two per year, is the law firm exempt. *See, Mertes v. Tevitt*, 734 F. Supp. 872 (W.D. Wis. 1990).

The Act covers a multitude of non-litigation activities regularly engaged in by lawyers. Lawyers are subject to the Act when sending notices to debtors in foreclosure proceedings. *Crossley v. Leiberman*, 868 F.2d 566 (3rd Cir. 1989). Attorneys and law firms are subject to the FDCPA in the same manner as lay debt collectors if they send a pre-suit demand letter or engage in any communication with a debtor outside of litigation. *See, e.g., Graziano v. Harrison*, 950 F.2d 107 (3rd Cir. 1991); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992). Accordingly, the effective result of the Seventh Circuit decision reaches well beyond traditional collection activities and into the litigation practices of many lawyers and law firms throughout the country.

A lawyer owes each client a duty of zealous advocacy tempered by solemn obligations to only pursue meritorious claims and to not knowingly misrepresent facts or law to the court. *See*, MODEL RULES OF PROFESSIONAL CONDUCT, RULES 3.1, 3.3 (1983). The honest, ethical attorney has much to fear from a ruling holding attorneys engaged in litigation to FDCPA liability. In all litigation there is a winner and a loser. A creditor's attorney who obtains anything less than full victory would become strictly liable to the debtor under the Seventh Circuit's ruling. *See, Green v. Hocking, supra.* This result would encourage litigation of every case, regardless of the disputed amount, and would discourage efforts at compromise and settlement by debtors

hoping for a windfall FDCPA case if the court enters any credit or offset against the amount claimed.

In repealing the attorney exemption to FDCPA, Congress neither intended nor contemplated expanding the reach of the statute so that it would infringe on the litigation process, which serves as the ultimate truth-finder. Nor did Congress intend to usurp authority from the judicial system in the regulation of attorneys involved in litigation. By broadly expanding the framework of the FDCPA, lawsuits against creditor attorneys who are merely fulfilling their professional responsibilities in enforcing their clients' rights will become commonplace.

CONCLUSION

For the aforestated reasons, your *amicus* requests this Honorable Court to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit and determine that, with the exception of the fair venue provision found at 15 U.S.C. § 1692i, the FDCPA does not apply to attorneys engaging in litigation activities.

Respectfully submitted,

Ronald S. Canter, Esq.*
7272 Wisconsin Ave., 4th Fl.
Bethesda, MD 20814-4838
(301) 951-8500
Counsel for Amicus Curiae
National Assoc. of Retail
Collection Attorneys

Rosalie B. Levinson, Esq.
122 West 79th Avenue
Merrillville, IN 46410
Counsel for Amicus Curiae

Of Counsel
Ronald M. Abramson, Esq.
7272 Wisconsin Ave., 4th Fl.
Bethesda, MD 20814-4838

* *Counsel of Record*

December 15, 1994

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

George W. Heintz, et. al.	*	
Petitioners	*	
vs.	*	Case No: 94-367
Darlene Jenkins	*	
Respondent	*	

The undersigned attorney for Petitioners in the above-entitled matter hereby consents to the filing of an Amicus Curiae Brief supporting the position of the Petitioners by the National Association of Retail Collection Attorneys.

HINSHAW & CULBERTSON

BY: BRUCE CARMEN

Bruce Carmen
222 North LaSalle
Suite 300
Chicago, IL 60601
Attorney for Petitioners

Appendix A

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1994

George W. Heintz, et. al.	*	
Petitioners	*	
vs.	*	Case No: 94-367
Darlene Jenkins	*	
Respondent	*	

The undersigned attorney for Respondent in the above-entitled matter hereby consents to the filing of an Amicus Curiae Brief in support of the Petitioners by the National Associations of Retail Collection Attorneys.

EDELMAN & COMBS

BY: DANIEL A. EDELMAN

Daniel A. Edelman
135 South LaSalle Street
Suite 1006
Chicago, IL 60603
Attorney for Respondent

(1)

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ, *et al.*,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

MANUEL H. NEWBURGER
BARBARA M. BARRON
Counsel for the Commercial Law League of America, Amicus Curiae

BARRON & NEWBURGER, P.C.
900 Congress Avenue, Suite 200
Austin, Texas 78701
(512) 476-9103
Telecopier: (512) 476-9253

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

33 pp

QUESTION PRESENTED

Whether attorneys engaged solely in the prosecution of litigation against consumers are regulated by the Fair Debt Collection Practices Act (15 U.S.C. §§ 1692 - 1692o, Pub.L. 90-321, Title VIII, §§ 802 - 817).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases	PAGE
Baker v. G.C. Services Corp., 677 F.2d 775 (9th Cir. 1982)	20
Bates v. C & S Adjustors, Inc., 908 F.2d 865 (2d Cir. 1992)	23
Bentley v. Great Lakes Collection Bureau, Inc., 6 F.3d 60 (2d Cir. 1993)	6, 9, 15, 20, 22
Carroll v. Wolpoff & Abramson, 961 F.2d 459 (4th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992)	5, 16
Clomon v. Jackson, 988 F.2d 1314 (2d Cir. 1993)	6, 15, 20, 22
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990)	24
Emmanuel v. American Credit Exchange, 870 F.2d 805 (2d Cir. 1989)	7, 20, 23
Fox v. Citicorp Credit Services, Inc., 15 F.3d 1507 (9th Cir. 1994)	8, 9
Frey v. Gangwish, 970 F.2d 1516 (6th Cir. 1992)	5, 6, 11, 12, 16
George A. Fuller Co. v. Carpet Services, Inc., 823 S.W.2d 603 (Tex. 1992)	12
Graziano v. Harrison, 950 F.2d 107 (3d Cir. 1991)	5, 7, 13, 14, 23
Green v. Hocking, 9 F.3d 18 (6th Cir. 1993)	5, 8, 9, 10, 11, 19, 21
Harper v. Better Business Services, Inc., 961 F.2d 1561 (11th Cir. 1992)	7

Constitution, Statutes, and Rules

Miscellaneous

No. 94-367

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

GEORGE W. HEINTZ, *et al.*,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE COMMERCIAL LAW LEAGUE OF AMERICA, *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, the Commercial Law League of America respectfully submits this brief as *Amicus Curiae*, in support of the Petitioners. Petitioners and Respondent have both consented to the filing of this brief, and true copies of such are filed herewith.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 25 F.3d 536. The opinion of the district court is not reported.

INTEREST OF THE *AMICUS CURIAE*

The Commercial Law League of America (CLLA) is a 100-year-old national organization of attorneys, commercial collection agencies, and other experts in credit and finance actively engaged in the fields of commercial law and bankruptcy and reorganization. The CLLA is the publisher of the award-winning *Commercial Law Journal* and *Commercial Law Bulletin*. It has long been associated with the representation of creditor interests, while at the same time seeking fair, equitable, and efficient administration of commercial and bankruptcy cases for all parties-in-interest. The League has been firmly committed to policing its own industry and has regularly provided articles and presentations to its members on the manner in which attorneys, collection agents, and creditors need to conduct themselves when engaging in debt collection activities.

Through its representatives, the CLLA has testified before Congress on numerous occasions, and the League has provided expert testimony in the fields of collections and bankruptcy and reorganization. In 1992, the League provided testimony at the oversight hearings on the Fair Debt Collection Practices Act. A substantial number of the attorneys and agencies in the League collect consumer debts, and the FDCPA has a significant impact on those members and their clients.

STATEMENT

Respondent Darlene Jenkins borrowed money from Gainer Bank to purchase a car. The installment contract between Respondent and the bank required that she keep insurance on the car until she made her last payment. If she did not keep insurance, the installment contract allowed the bank to purchase insurance for the car and then to charge Jenkins for the cost of the insurance. Specifically, the installment contract provided:

> if the Buyer does not pay the taxes on the collateral [or] keep it insured against loss or damage, . . . the Creditor can if it wishes to do so and Buyer will have to reimburse the Creditor upon demand, or Creditor at its sole option, may add said expenses to the Buyer's unpaid balance, which shall be payable by the Buyer at the annual percentage rate then in effect.

Respondent defaulted on her loan. She also stopped buying insurance for the car. The bank then purchased insurance and hired an attorney (Petitioner George W. Heintz) and his law firm (Petitioner Bowman, Heintz, Boscia & McPhee) to recover the remaining installment payments and the cost of the insurance. Petitioners sued Respondent on behalf of the bank, demanding both the installment payments and a $4,173.00 insurance charge, and then attempted to settle the matter out of court.

Respondent took issue with the $4,173.00 insurance demand. She believed that the bank did not buy simple damage and loss insurance for the car but instead purchased a financial protection policy to insure against the possibility that she might default on the loan. Her position was that she was only required to reimburse the bank if it purchased damage and loss insurance for the car and that she had no obligation to reimburse the bank for the protection policy.

Respondent filed suit against Petitioners, alleging that their attempts to pass the unauthorized insurance costs on to her violated the Fair Debt Collection Practices Act. Her legal theory was two-fold. First, she claimed that the insurance charge was not authorized by the installment contract, and therefore alleged that Petitioners violated 15 U.S.C. § 1692f of the Act by adding an unauthorized amount onto

the debt. Second, she claimed that Petitioners' attempt to include the insurance charge on her bill amounted to a "false representation or deceptive means to collect any debt" in violation of 15 U.S.C. § 1692e.

Petitioners moved to dismiss under Fed. R. Civ. P. 12(b)(6), asserting that Congress simply could not have intended to regulate normal legal proceedings under the auspices of the Act. The District Court agreed and dismissed the case. Respondent appealed to the United States Court of Appeals for the Seventh Circuit, which held that Congress' deletion of the attorney exemption renders attorneys subject to the restrictions of the FDCPA even when they are engaged in purely legal activities.

SUMMARY OF ARGUMENT

Amicus Curiae contends that the wholesale application of the Fair Debt Collection Practices Act to all activities of collection attorneys, including those activities that are purely legal in nature, prevents attorneys from effectively practicing law and aggressively representing their clients. These effects were neither envisioned nor intended by Congress in deleting the attorney exemption from the Act in 1986, and they go far beyond the legislative goal of protecting consumers from abusive debt collection practices.

The Court of Appeals' holding that purely litigation activities are regulated by the FDCPA results in the Congressional regulation of state court pleadings and procedures. Furthermore, such regulation could prevent creditors from ever having their day in court and could impose upon their attorneys strict liability every time a creditor fails to prevail on each and every theory of liability and element of damages sought in a suit.

ARGUMENT

Introduction

The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 - 1692o, Pub.L. 90-321, Title VIII, §§ 802 - 817 ("FDCPA" or "the Act"), was enacted in 1977, "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." 15 U.S.C. § 1692(e). Although 15 U.S.C. § 1692a(6)(F) originally exempted attorneys engaged in debt collection from regulation under the Act, that exemption was deleted in 1986 in order to eliminate the ability of attorneys to engage in those sorts of activities prohibited for other debt collectors and to prevent attorneys from competing unfairly with non-lawyer collectors. *See* H.R. Rep. No. 405, 99th Cong., 2d Sess. 3-7, reprinted in 1986 U.S.C.C.A.N. 1752, 1754-57; *Green v. Hocking*, 9 F.3d 18, 21 (6th Cir. 1993).

Despite the evil that Congress intended to address, the reported case law indicates that attorneys are being subjected to liability *not* for the sort of abusive practices that the Act was intended to regulate, (*see* S. Rep. No. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696), but rather for technical violations of the Act that have caused little or no injury to the consumer. *See, e.g. Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 298, 121 L.Ed.2d 222 (1992); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992); *Graziano v. Harrison*, 950 F.2d 107 (3d Cir. 1991). At least one appellate judge has suggested that in some instances, the Act has become a mere profit-generating mechanism for attorneys who appear to be more interested in making fees than in stopping abusive collection practices

or helping consumers. *See Frey v. Gangwish*, *supra*, at 1521-1522, (Suhrheinrich, J., dissenting). The CLLA acknowledges that these cases have involved violations of the technical language of the Act, but they certainly do not evidence the sort of abuse or harassment of consumers that the FDCPA was designed to address.

The legislative history of the FDCPA indicates that by deleting the attorney exemption, Congress was attempting to level the playing field and subject attorneys to the same sort of restrictions and burdens that were already imposed upon collection agencies. *See* S. Rep. No. 382, 95th Cong., 1st Sess. 2, reprinted in 1977 U.S.C.C.A.N. 1695, 1696. Instead, as will be addressed below, the holding of the Court below serves to go far beyond removing a competitive disadvantage as it impairs the ability of attorneys to conduct any business at all.

Special Judicially-Created Rules

The earlier case law that has developed under the FDCPA has resulted in the evolution of a number of "rules" of application of the Act. The holding of the Court of Appeals' in the instant case should be examined in light of some of these earlier "rules" in order to fully appreciate its implications. These general doctrines are:

a. The FDCPA is a strict liability statute and the degree of culpability of a "debt collector" is relevant only on the issue of damages. *Clomon v. Jackson*, 988 F.2d 1314, 1320 (2d Cir. 1993); *Bentley v. Great Lakes Collection Bureau, Inc.*, 6 F.3d 60, 63 (2d Cir. 1993).

b. In testing for a violation of the FDCPA, the question is whether the conduct of a debt collector would tend to deceive the "least sophisticated consumer." *Clomon v. Jackson*, *supra*, at 1318; *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168 (11th Cir. 1985); *Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992).

c. Upon proof of a violation of the Act, a prevailing consumer will be entitled to an award of attorney's fees, even if (s)he fails to prove any damages. *Emmanuel v. American Credit Exchange*, 870 F.2d 805, 809 (2d Cir. 1989); *Pipiles v. Credit Bureau of Lockport, Inc.*, 886 F.2d 22, 28 (2d Cir. 1989); *Graziano v. Harrison*, *supra*, at 113-114.

d. In awarding fees to a prevailing consumer, a trier of fact may make such award at prevailing market rates, even if the attorneys are not themselves paid at market rates. *Hollis v. Roberts*, 984 F.2d 1159 (11th Cir. 1993); *Cf. Harper v. Better Business Services, Inc.*, 961 F.2d 1561 (11th Cir. 1992). Thus, legal assistance organizations who have access to vast pools of potential clients have the ability to bully attorneys into settlements by the threat of market rate fees in cases which will otherwise result in no damage awards.

There are additional special doctrines under the Act which will be addressed below as they apply to the instant case. In this case, the Court of Appeals has held that Petitioners' conduct in filing pleadings is a type of collection activity regulated by the FDCPA. The remainder of this brief will address the effect of subjecting purely litigation activities to regulation under the Act.

Lawyers As "Debt Collectors"

In the Fair Debt context, the term "debt" means "any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment." 15 U.S.C. § 1692a(5). To qualify as a "debt collector," an attorney must be a "person who uses any instrumentality of interstate commerce or the mails in any busi-

ness the principal purpose of which is the collection of debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. § 1692a(6). Even those attorneys who only occasionally collect debts for others may be regulated by the Act since debt collection may be a "regular" part of one's practice, even if not a substantial part. Thus, collection activities amounting to only a small fraction of a firm's total activity may be enough to qualify the firm as a "debt collector." *Stojanovski v. Strobl & Manoogian, P.C.*, 783 F.Supp. 319 (E.D.Mi. 1992).

In *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992), the Court of Appeals held that the FDCPA applied to attorneys who were engaged in purely legal activities, reasoning that the performance of exclusively legal tasks can be the sort of "indirect" debt collection subject to the Act. Although *Scott* only involved violations of 11 U.S.C. § 1692i (the venue provision of the Act), the Fourth Circuit did not expressly limit its holding to violations of that one section and left open the question of whether the Act regulated all litigation activities. That gap has been filled with a split in Circuit authorities. The Sixth Circuit held in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993), that "the actions of an attorney while conducting litigation are not covered by the FDCPA" but the Ninth Circuit in *Fox v. Citicorp Credit Services, Inc.*, 15 F.3d 1507 (9th Cir. 1994) and the Seventh Circuit in the present case held that such activities are covered by the Act.

The CLLA does not contend that the result in *Scott v. Jones* was erroneous, since 15 U.S.C. § 1692i evidenced a clear intent by Congress to protect consumers from the abuse occasioned by the filing of debt collection suits in distant forums. In few other sections of the Act, however, did Congress address litigation-related activities, and in

those instances where it did so, it concerned itself with unauthorized practices of law, falsification of official court documents, and misrepresentations concerning legal process. 15 U.S.C. §§ 1692e(3), (9), (13), and (15). The specific prohibitions in these areas were enacted prior to the 1986 amendment, and they appear merely to provide restrictions upon non-lawyers that already would exist under attorney disciplinary rules and/or Fed. R. Civ. P. 11. Because *Fox v. Citicorp Credit Services, Inc.* involved venue violations of 15 U.S.C. § 1692i, the CLLA asserts that it is distinguishable from the case at bar and does not provide good authority in support of Respondent's position.

If this Court chooses to extend the regulation of the FDCPA to all legal activities and not just those specifically described in the Act, then the Court will be effectively ruling that attorneys are to be held strictly liable for violations allegedly committed in the course of prosecuting suits. *See Bentley v. Great Lakes Collection Bureau* at 63. This may not be an inherently evil result in the area of venue violations such as those in *Scott v. Jones* and *Fox v. Citicorp Credit Services, Inc.* The fact situations in the present case and in *Green v. Hocking*, however, demonstrate why an absolute application of the Act to legal activities should offend traditional notions of due process because of the chilling effect upon the practice of law and on the ability of creditors to secure their day in court. In fact, as discussed below and in the Court of Appeals' opinion in *Green v. Hocking*, a literal reading of the Act would indicate that such application could prevent a creditor from ever having its day in court.

In *Green v. Hocking*, the attorney (Hocking) did not contact the debtor before filing suit and engaged in none of the traditional non-litigation collection activities such as telephoning the debtor or sending dunning letters. The

original collection suit that Hocking filed alleged that Green owed his client a total of $304.83, which included interest at an erroneous rate. Hocking subsequently filed an amended complaint, stating that Green owed $239.56 (calculated at the correct interest rate) after Green called to his attention the interest rate error. After the parties settled the underlying collection dispute, Green sued Hocking in federal court, alleging that he had violated 15 U.S.C. § 1692e(2)(A)[1] by the falsely representing the amount of a debt, and 15 U.S.C. § 1692f(1)[2] by attempting to collect an amount, including interest, that was not "expressly authorized by the agreement creating the debt or permitted by law." The District Court dismissed the case, ruling that Hocking was immune from liability under the FDCPA because he confined his activities to those of a legal nature. The Sixth Circuit upheld that finding, holding that "the actions of an attorney while conducting litigation are not covered by the FDCPA." *Id.* at 22.

The Seventh Circuit reached an opposite result in the instant case, holding that regardless of the wisdom of its actions, Congress regulated even litigation-related debt collection activities when it deleted the attorney exemption.

---

[1] 15 U.S.C. § 1692e prohibits a "debt collector" from using any false, deceptive, or misleading representation or means in connection with the collection of any debt. 15 U.S.C. § 1692e(2)(A) includes under the heading of "false, deceptive, or misleading," falsely representing the character, amount, or legal status of any debt.

[2] 15 U.S.C. § 1692f prohibits a debt collector from using unfair or unconscionable means to collect or attempt to collect any debt. Pursuant to 15 U.S.C. § 1692f(1) the term "unfair practices" includes the collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

Jenkins v. Heintz, 25 F.3d 536, 539 (7th Cir. 1994), *cert. granted*, ___ U.S. ___, 63 U.S.L.W. 3161 (October 31, 1994). The Second Circuit, while it has not yet ruled on the issue, has at least indicated in dicta that it would probably be in accord with the Seventh and Ninth Circuits. *See Paulemon v. Tobin*, 30 F.3d 307, 310 (2d Cir. 1994). The Sixth Circuit noted in *Green v. Hocking* that this "result would produce absurd outcomes," and most of the remainder of this brief will concentrate on examples of some of the outrageous situations that could easily result from the Seventh Circuit's ruling in the instant case.

Validation Of Debts

Within five (5) days of a debt collector's initial communication with the consumer in connection with the collection of any debt, (s)he must send the consumer the validation of debt notice required by 15 U.S.C. § 1692g. Some attorneys (such as Mr. Hocking) have attempted to avoid this requirement by limiting their activities to exclusively legal tasks. They make it their practice to file suit without ever making written or oral demand on the debtor, thus avoiding engaging in the sort of "traditional" debt collection activities that the FDCPA was originally intended to regulate. Once a judgment has been obtained, however, it may be unavoidable for an attorney to correspond with the judgment debtor if the judgment is to be enforced.

In *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992), the "debt collector" was an attorney who had filed suit and ultimately negotiated an agreed judgment and payout with the consumer. More than a year later, the consumer defaulted on the payment plan and the attorney wrote to her in connection with the judgment debt. The consumer filed suit against Mr. Gangwish asserting, *inter alia*, that he had violated the FDCPA by failing to give to her the validation

of debt notice in his post-judgment communications. The Court of Appeals reversed a summary judgment in favor of the attorney, finding that because he had never communicated directly with the debtor prior to judgment, he was required to give the notice after he wrote directly to Ms. Frey. Thus, although the consumer had actually appeared in the suit and had agreed to a judgment, the attorney was still subjected to liability for failing to furnish her with information that she already possessed as a result of the suit, informing her of the right to dispute a debt consisting of the very judgment to which she had agreed.

The question of whether all litigation activities are "debt collection" was not before the court in *Frey v. Gangwish*. If that is the ruling of the Supreme Court in this case, then it is possible that in cases where there has been no prior communication, the validation notice will have to be given within five days of service of the suit upon the debtor. Granted, one may argue that: (a) the complaint is directed to the court and not the debtor;[3] and (b) the citation is a communication from the court and not the attorney. Neither of those excuses is particularly satisfactory with regard to discovery, however, since discovery is ordinarily directed from the attorney to the debtor. The application of the Act to litigation activities could trigger a duty to send the validation notice (if not previously given) within five days of the service of discovery and possibly within five days of service of the complaint in jurisdictions that permit service of discovery with the initial complaint. (*See, e.g.*,

[3] In *George A. Fuller Co. v. Carpet Services, Inc.*, 823 S.W.2d 603 (Tex. 1992), the issue before the Court was whether the filing of a suit alleging an excessive amount of interest was a "charging" of interest for the purpose of the Texas usury statute. The Court held that it was not, based in part upon the conclusion that pleadings are directed to the trial court rather than to the opposing party. *Id.* at 605.

Tex. R. Civ. P. 167 and 168.) The establishment of such a rule of law would undermine the very purpose of the Act as it only serves to confuse and mislead the consumer who is told by the attorney that (s)he has thirty days to validate the debt but is instructed by the Court to answer the suit in a shorter time.

Overshadowing the Thirty Day Notice

The problems with the validation notice and litigation activities go far beyond the question of when it must be sent. In *Swanson v. Southern Oregon Credit Service, Inc.*, 869 F.2d 1222 (9th Cir. 1988), the Ninth Circuit held that the validation notice must not be overshadowed or contradicted by other messages or notices appearing in the initial communication, and that any attempt to require the debtor to act immediately and not take the full thirty days to request verification is a violation of § 1692g. *Id.* at 1225 - 1226. Similar results were reached by the Third Circuit in *Graziano v. Harrison*, *supra*, and the Fourth Circuit in *Miller v. Payco - General American Credits, Inc.*, 943 F.2d 482 (4th Cir. 1991).

A review of the FDCPA indicates that nowhere does the Act generally prohibit a debt collector from taking action to collect the debt during the thirty-day validation period. If Congress had wanted to include such a prohibition it certainly could have done so, as it did for the specific situations in which a debt collector must cease collection activities because the consumer has made a written request for verification of the debt or a written demand to cease communications. *See* 15 U.S.C. §§ 1692g(b) and 1692c(c). In *Graziano v. Harrison*, the attorney (Harrison) sent a letter containing the validation notice, but that letter also threatened legal action if the debt was not paid within ten days. Relying upon *Swanson*, the Third Circuit held that in

making that threat Harrison had violated the FDCPA because the "least sophisticated debtor" might have been induced to overlook the right to dispute the debt within thirty days. Thus, as things currently stand, it appears that it is not a violation of the Act to file suit during the validation period, *but it is a violation to truthfully inform the consumer that the creditor may take such action.*

If any and all litigation activities are "debt collection" then the combination of such a rule with the *Swanson* doctrine presents a significant disruption in the practice of debt collection litigation. If service of the citation and complaint (or a transmittal letter in connection therewith) is a "communication," then a citation's requirement to answer within a period of less than thirty days may arguably violate the holdings in *Swanson, Graziano, and Miller*.

Even if attorneys can escape the problem with regard to pleadings, one must come back to the question of discovery. In the common situation in which: (a) the attorney has never written nor spoken to the debtor; (b) suit has been filed and the defendant has answered *pro se*; and (c) a deposition notice is served, directed from the attorney to the debtor, requiring the debtor to appear in ten days to give a deposition, a problem may arise under the Act. If the attorney does not give the validation notice at this point (s)he may be in violation of the FDCPA, and if the validation notice is given then the deposition notice may overshadow and contradict the thirty-day period so as to constitute a violation. Even if the deposition is scheduled for after the expiration of the thirty-day period, the effect of a *subpoena duces tecum* may be that by forcing the consumer to begin collecting documents, it coerces the debtor to take less than thirty days to dispute the debt, and that is the result prohibited by *Swanson*, *Graziano*, and *Miller*, *supra*.

Demanding Verification

In addition to the problem of when to send the validation notice and the "overshadowing" issue, the validation of debt section of the Act presents an additional complication when applied to litigation. If the consumer notifies the attorney in writing within the thirty day period described in 15 U.S.C. § 1692g(a) that the debt or any portion thereof is disputed or that the consumer requests the name and address of the original creditor, the attorney will be **prohibited** from attempting to collect the debt or any disputed portion thereof, until (s)he obtains verification of the debt or a copy of the judgment or the name and address of the original creditor and a copy of such information is mailed to the consumer. 15 U.S.C. § 1692g(b). If this provision of the Act is applied to litigation activities, the FDCPA gives a debtor the ability to temporarily shut down the litigation and discovery processes, as the creditor's attorney can be prevented from continuing to litigate until verification has been sent. Moreover, if the filing of an answer in a suit is construed to be written notice to the attorney that the debt is disputed, the debtor's mere failure to default may trigger the attorney's obligations and restrictions under 15 U.S.C. § 1692g(b) in every contested case. Because of the strict liability holding in *Clomon* and *Bentley*, *supra*, and the mandatory fee award holdings noted above, this presents significant exposure to the creditors' bar in the United States.

The "Miranda Warning"

Except for communications made to acquire location information under § 1692b, the debt collector must disclose clearly in all communications made to collect a debt or to obtain information about a consumer "that the debt collector is attempting to collect a debt and that any information

obtained will be used for that purpose." 15 U.S.C. § 1692e(11). The failure to make such disclosure is a "false, deceptive, or misleading representation or means" in connection with the collection of a debt. *Id.* Unlike other portions of the Act that deal with actual abuse of consumers, this section has been applied against attorneys who neither abused nor harassed debtors, producing results which are illogical and do nothing to further the purposes of the Act. In *Frey v. Gangwish, supra*, and *Carroll v. Wolpoff & Abramson, supra*, attorneys were held liable for failing to notify debtors in *post-judgment* communications that they were attempting to collect debts and that the information obtained would be used for that purpose. How could the consumer not know at the post-judgment stage that the attorney is attempting to collect a debt, and for what other purpose would any information be used?

If litigation activities are "debt collection," then the warning arguably has to be given in all pleadings. Even if this Court decides that pleadings are not "communications," the question remains as to whether the warning will be necessary in discovery documents, transmittal letters, hearings, depositions, etc. Those communications appear to be clearly intended for the purpose of collecting the debt and it is hard to reconcile the holding of the Court below with the arguments of those who insist that the warning need not be given in connection with litigation-related communications. While the apparently unambiguous language of the Act (*see Pipiles v. Credit Bureau of Lockport, Inc., supra* at 26-27) may necessitate a slavish adherence to the letter of the statute in post-judgment dunning letters and phone calls, applying the Act to litigation activities and permitting it to regulate the contents of pleadings is an invitation to open the floodgates of litigation for plaintiffs who have not actually suffered any damages.

Communications In General

Unless (s)he has received direct prior consent from the consumer or express permission from a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt:

a. at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer; or

b. at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication. 15 U.S.C. §§ 1692c(a)(1) and (3).

If the Act regulates attorneys' litigation activities, it may be argued that a debtor cannot be served with citation or discovery subpoenas at his/her place of employment. A debtor might even be able to prevent service of citation or subpoenas completely by notifying the attorney that all times will be inconvenient. Beyond the possibility that this section of the Act could impair a creditor's ability to diligently prosecute a suit against a debtor who is evading process, a creative debtor's attorney may be able to find a Fair Debt claim in every debt collection suit. The clearest example of this problem is in the area of medical collection suits against the ill and infirm. Their lawyers could easily argue that they will always be inconvenienced by service of court documents. Thus, attorneys who represent health care providers may be exposed to Fair Debt litigation every time they file a suit.

Acquisition Of Location Information

When communicating with any person other than the consumer for the purpose of acquiring location information about the consumer, a debt collector may not:

a. state that such consumer owes any debt, 15 U.S.C. § 1692b(2); nor

b. communicate with any person other than the consumer's attorney, at any time after the debt collector knows the consumer is represented by an attorney with regard to the subject debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to communication from the debt collector. 15 U.S.C. § 1692b(6).

If applied to litigation activities, these sub-sections would substantially restrict an attorney's ability to communicate with process servers and skip-tracers, a result that does not appear to have been envisioned by Congress in deleting the attorney exemption. If an attorney cannot skip-trace the debtor (s)he may be unable to effect personal service. Admittedly, there may be the option of service by publication, but leaving collection attorneys with that as their only option seems to be contrary to the very purposes of the Act. Furthermore, as is discussed below, applying the Act to litigation activities presents problems for an attorney seeking to serve by publication.

Communication With Third Parties

Except as provided in 15 U.S.C. § 1692b[4], a debt collector may not communicate in connection with the collection of a debt with any person other than the consumer, the consumer's attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector, without either: (a) the prior consent of the consumer given directly to the debt collector; (b) the express permission of a court of competent

[4] The section dealing with locating the debtor.

jurisdiction; or (c) as reasonably necessary to effectuate a post-judgment judicial remedy. 15 U.S.C. § 1692c(b). Applying this section of the Act under the holding of the Court below to purely pre-trial litigation activities would mean that a creditor's attorney could not (without express prior approval from the trial court) discuss a case with fact witnesses[5] or even process servers, as such communications would be "in connection with" the collection of a debt. The most literal reading of this section would prohibit the attorney from discussing the suit with the clerk or other personnel employed by the trial court, and the Sixth Circuit has stated its belief that such is the very result of the legal position taken by Respondent. *See Green v. Hocking*, *supra*, at 21. It would also bar citation by publication without a specific court order, even if that form of service is expressly authorized under state law, as such publication would be a communication with thousands of third parties.[6] Substituted service upon other persons at the consumer's place of business or abode in situations in which the consumer is evading service of process will require orders granting express permission under this section. Thus, the Court of Appeals' holding in the instant case will also necessitate a flood of additional motions and pleadings in all consumer debt collection suits in which the debtor cannot be served personally, as attorneys will want to limit their exposure under the Act.

[5] In *Masuda v. Thomas Richards & Co.*, 759 F.Supp. 1456 (C.D.Cal. 1991), the Court found, as a matter of law, that contacting the consumer's insurance company without his consent violated § 1692c(b). In a disputed claim over medical bills, for example, such contact may be essential, especially when a creditor is asserting a medical lien and the consumer received direct payment from the insurer and spent the money.

[6] Of course, local publications such as weekly trial court reporters can publish the names of parties, facts of cases, and results of suits with impunity as they are not regulated by the FDCPA.

The result of applying Section 1692c(b) of the Act to purely legal activities is a massive chilling effect upon attorneys. How can attorneys carry out their ethical duty to represent their clients zealously within the bounds of the law if they are subject to being second-guessed and sued in connection with every service of citation or subpoena or public sale of a debtor's property under court process, over whether the public communications made in connection therewith were "reasonably necessary?" Since the bona fide error defense set out in 15 U.S.C. § 1692k(c) will not be available if the attorney commits an error of law, (*see Smith v. Transworld Systems, Inc.*, 953 F.2d 1025 (6th Cir. 1992), *Baker v. G.C. Services Corp.*, 677 F.2d 775, 779 (9th Cir. 1982)), the holdings in *Clomon*, *Bentley*, and *Emmanuel*, *supra*, expose attorneys to strict liability for guessing wrongly about the reasonable necessity of third party communications relating to pending suits or judgments.

Ceasing Communication

If a consumer[7] notifies a debt collector in writing that (s)he refuses to pay a debt or that (s)he wishes the collector to cease further communication, the debt collector is prohibited from communicating further with the consumer except:

a. to advise the consumer that the debt collector's further efforts are being terminated;

b. to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or

---

[7] For the purpose of this section, the term "consumer" includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator. 15 U.S.C. § 1692c(d).

c. where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy. 15 U.S.C. § 1692c(c).

If litigation activities are regulated by the FDCPA, then arguably a consumer could send written notice to an attorney that (s)he refuses to pay a debt, and the attorney would be prohibited from pursuing suit since that would necessarily require numerous communications with the consumer. This very concern was raised by the Sixth Circuit as a reason to not include litigation activities as debt collection. *Green v. Hocking*, *supra*, at 21. What even that court did not consider was that the application of Section 1692c(c) to purely legal activities could also enable a judgment debtor to prevent an attorney from conducting discovery in aid of judgment or otherwise enforcing a judgment. Surely that result deprives creditors of their right to due process under the Constitution. Furthermore, if creditors cannot adequately enforce debts that are due to them then consumers will ultimately be the ones to suffer as there will be a necessary tightening of credit granting practices.

False Or Misleading Representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. The terms "false, deceptive, or misleading" include:

a. the false representation of -

(1) the character, amount, or legal status of any debt; or

(2) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt;

b. the threat to take any action that cannot legally be taken or that is not intended to be taken; and

c. communicating or threatening to communicate to any person credit information which is known or which should be known to be false, including the failure to communicate that a disputed debt is disputed. 15 U.S.C. §§ 1692e(2), (5), and (8).

These sections of the Act were written prior to the 1986 deletion of the attorney exemption. While they make perfect sense when applied to debt collection activities outside of litigation (such as demand letters and collection calls), they present numerous problems when applied to purely legal activities. With regard to the first two sub-sections set forth above, they leave attorneys exposed to statutory liability for any typographical errors in pleadings and for any theory of recovery on which they are not successful. For example, if an attorney's secretary makes a typographical error on the amount of a debt, the error can be corrected without injury to the consumer, since: (a) the pleading can be amended; and (b) the trial court will still presumably allow recovery only for that which is legally proven at trial. Because the FDCPA is a strict liability statute, however, (*see Clomon v. Jackson* at 1320 and *Bentley v. Great Lakes Collection Bureau* at 63), the attorney could still be exposed to statutory damages and attorney's fees for the innocent error. While the attorney could, in that instance, invoke the bona fide error defense under 15 U.S.C. § 1692k(c), (s)he would still have to incur the substantial expense of defending the Fair Debt suit and proving that defense.

In addition to exposure for technical violations, an attorney is also exposed to FDCPA liability if (s)he asserts a cause of action or theory of recovery which is not ultimately successful, as arguably that would be misrepresenting the "compensation which may be lawfully received" or a "threat to take any action that cannot legally be taken." Thus, Respondent's assertion that the Act applies to purely legal activities has the potential effect of imposing strict statutory liability on attorneys if they should lose on their theories of liability. The CLLA urges the Court not to countenance such a result because of its chilling effect on the practice of law. Even if such a violation produces no actual damages because the consumer was found to be liable on an alternate theory of recovery, the award of attorney's fees for a violation of the Act is still mandatory, and the attorney could be punished for the client's inability to prove even one of its claims. *See Emmanuel v. American Credit Exchange*, *supra*, at 809; *Pipiles v. Credit Bureau of Lockport, Inc.*, *supra*, at 28; *Graziano v. Harrison*, *supra*, at 113-114.

Yet another problem presented by 15 U.S.C. § 1692e is that which arises when the consumer has previously disputed the debt. Assuming that suit can even be filed at that point,[8] an attorney's failure to disclose in the complaint that the debt is disputed may arguably create liability under 15 U.S.C. § 1692e(8). Thus, the extension of FDCPA regulation to purely legal activities results in Congressional regulation of the content of all collection suit pleadings.

Reverse Forum Abuse

While the FDCPA protects consumers from the burden of being sued in a distant and inconvenient forum, it has precisely the opposite effect for debt collectors who are sued under the Act. The Second Circuit has held that it is the place where the consumer receives the offending communication from a debt collector that governs venue in a Fair Debt suit. *Bates v. C & S Adjustors, Inc.*, 908 F.2d 865 (2d Cir. 1992). In that case, the collection letter was mailed to

[8] As noted above, 15 U.S.C. §§ 1692c and 1692g(b) may arguably prohibit the attorney from filing suit.

the debtor at his former address in Pennsylvania, but it was forwarded by the post office to his new address in New York. Although the collector did not intend to communicate with the debtor in New York, the receipt of the notice there was controlling. The Court of Appeals suggested that the only way to avoid such exposure is to stamp the envelope "do not forward." It would therefore appear that an attorney "debt collector" who properly sues a resident of another state in full compliance with 15 U.S.C. § 1692i might be subjected to venue and jurisdiction in that foreign state if the suit pleadings received by the debtor are alleged to be violations of the Act.

Rule 11 and Its State Court Equivalents

As noted by the Court of Appeals in *Green v. Hocking*, Fed. R. Civ. P. 11 already insures that an attorney who signs any document verifies that (s)he has conducted an investigation, and that, to the best of the attorney's knowledge, the averments are accurate and grounded in fact. The decision to impose Rule 11 sanctions, however, rests with the sound discretion of the trial court. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990). This discretion, integral to Rule 11 because the court knows best how to regulate its forum, is eliminated and in its place is substituted a system of strict liability mandating sanctions in the form of attorney's fees and statutory damages whenever an attorney makes the slightest error.

Affirming the Court of Appeals holding in this case will effectively shift the regulation of attorneys from the judiciary to the Congress. Also, as noted above, the application of the FDCPA to purely litigation activities means that Congress will be taking over the regulation of pleadings and practice in state court lawsuits. The CLLA believes

that these are results which should not be permitted and which are not necessary evils for the protection of consumers. These issues will not be addressed at greater length, however, as it is the CLLA's understanding that the American Bar Association will be addressing them in its *amicus curiae* brief.

Privileged Use of Civil Proceedings

Outside of Rule 11, the authors of the RESTATEMENT OF TORTS recognized certain immunities for attorneys from liability arising out of the institution of litigation and the contents of pleadings. In the area of defamation, the RESTATEMENT (SECOND) OF TORTS § 586 (1977) provides:

> An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

"Comment a" to that section explains that "[t]he privilege stated in this Section is based upon a public policy of securing to attorneys as officers of the court the utmost freedom in their efforts to secure justice for their clients. Therefore the privilege is absolute."

The authors of the RESTATEMENT also recognized a general doctrine in favor of providing attorneys immunity from liability for the wrongful use of civil proceedings.

> An attorney who initiates a civil proceeding on behalf of his client or one who takes any steps in the proceeding is not liable if he has probable cause for his action (see § 675); and even if he has no probable cause and is convinced that his client's claim is unfounded, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of his

claim. (See § 676). An attorney is not required or expected to prejudge his client's claim, and although he is fully aware that its chances of success are comparatively slight, it is his responsibility to present it to the court for adjudication if his client so insists after he has explained to the client the nature of his chances. RESTATEMENT (SECOND) OF TORTS § 674 comment d (1977).

These sections of the RESTATEMENT make sense as they enable the attorney to represent the client "zealously within the bounds of the law." *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7; MODEL RULES OF PROFESSIONAL CONDUCT Preamble. If the opinion of the Court of Appeals below is affirmed, however, this Court may be adopting a rule of law diametrically opposed to that doctrine. The attorney will become the strictly liable insurer of the success of the creditor's assertions, while the creditor itself will not face such liability. 15 U.S.C. § 1692a(6)(A). This only serves to exacerbate an inherent and unavoidable conflict between attorney and client, a result which lessens the effectiveness and integrity of the judicial process. Furthermore, as the FDCPA only applies to suits to collect debts, the Court will be singling out a segment of the nation's bar who will be subject to strict liability in the conduct of litigation when attorneys in no other area are subject to such a standard.

FDCPA Regulation of Litigation Activities Is Likely to Harm Consumers

Finally, this *Amicus Curiae* contends that the long-term effect of regulating litigation activities under the FDCPA is that consumers, the very group whom the Act was intended to protect, will suffer. For all of the reasons noted above, the affirmation of the Court below will have a substantial chilling effect on the practice of law. That effect will impact upon credit grantors who will find it more difficult and more expensive to hire attorneys to sue on consumer debts.

If collecting such debts becomes more difficult (if not impossible), those credit grantors will necessarily require greater security in order to extend credit, and they will have to charge higher interest rates to compensate for the increased costs. These burdens will be borne by the consumers.

CONCLUSION

The judgment of the Court of Appeals, insofar as it reversed the trial court's dismissal of Respondent's suit and held that the FDCPA regulates attorneys when they are engaged in purely legal activities should be reversed.

Respectfully submitted,

MANUEL H. NEWBURGER
BARBARA M. BARRON
Counsel for the Commercial Law League of America, Amicus Curiae

BARRON & NEWBURGER, P.C.
900 Congress Avenue, Suite 200
Austin, Texas 78701
(512) 476-9103
Telecopier: (512) 476-9253

(8)

No. 94-367

In The

Supreme Court of the United States

October Term, 1994

GEORGE W. HEINTZ and BOWMAN,
HEINTZ, BOSCIA & McPHEE,

Petitioners,

v.

DARLENE JENKINS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

ANDREW ROSEN
STONE, SHEEHY, ROSEN & BYRNE, P.C.
Attorneys for Sherry Ann Edwards
1881 9th Street #105
Boulder, CO 80302
Telephone (303) 442-0802

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED FOR REVIEW

Is an attorney engaged solely to prosecute litigation against a consumer a "debt collector" within the meaning of the Fair Debt Collection Practices Act (15 U.S.C. § 1692a(6))?

TABLE OF CONTENTS

TABLE OF CITATIONS

INTEREST OF THE *AMICUS CURIAE*

Counsel represents Sherry Ann Edwards, a consumer who is currently involved in litigation involving the attempted foreclosure of her home by a law firm whose primary practice involves non-judicial foreclosures through the Public Trustee of the State of Colorado. Under Colorado law, a mortgagor is guaranteed the right to "cure" the default prior to foreclosure sale by paying the arrearages and expenses and thereby bringing the loan current. This right is protected by the filing of a Notice of Intent to Cure with the Public Trustee. The Public Trustee, in turn, requests that the foreclosing party prepare and file a statement as to the amount necessary to cure the default.

The figure provided by the foreclosing party is binding upon the Public Trustee, who serves in a ministerial capacity. Colorado does provide for limited court supervision of the foreclosure process through a hearing procedure set forth in the Colorado Rules of Civil Procedure ("Colo.R.Civ.P."), but it is limited to determining the existence of a default:

> The scope of the inquiry at such hearing shall not extend beyond the existence of the default or other circumstances authorizing, under the terms of the instruments described in the motion, exercise of a power of sale contained therein. . . .

Colo.R.Civ.P. 120(d). Counsel has, in a prior case, attempted to challenge the cure figure provided by a foreclosing party against a different consumer during the Colo.R.Civ.P. 120 procedure. The trial court in that case refused to consider such an argument, holding that it was

bound by the limitations as to the scope of inquiry set forth in Colo.R.Civ.P. 120(d). Because such rulings of the trial court are not reviewable on appeal under Colo.R.Civ.P. 120(d)[1] no higher court has reviewed or rendered a reported decision on this issue.

Because of the limited review afforded mortgagors, they are at great risk of losing their homes if they cannot "cure" the default. In Ms. Edwards' circumstances, the amounts contained in the cure letter, which were prepared and signed by the attorneys for the mortgagee, included amounts which she believes are erroneous and excessive. The attorneys were claiming, amongst other charges, that her monthly payments were over $200.00 when the promissory note required payments of only $133.10. They were also seeking attorney's fees, which were arguably not allowable under the terms of the Deed of Trust, which was the document containing the power of sale. As a result, the difference between what the Public Trustee was requiring to cure the default and what Ms. Edwards believed she legally owed was in the thousands of dollars. These were funds which she does not have.

Ms. Edwards' counsel initially attempted to informally resolve the dispute with counsel for the mortgagee, but they continued to demand all amounts claimed in the letter to the Public Trustee. Therefore, in order to protect herself from losing her property, Ms. Edwards was forced to commence litigation to enjoin the sale until a trial

[1] "Neither the granting nor denial of a motion under this Rule shall constitute an appealable order or judgment."

could be held on the disputed cure amount. She also alleged violations of the Fair Debt Collection Practices Act ("FDCPA") by the attorneys based upon their actions.

Ms. Edwards, unlike most debtors who are in default, was in a position to obtain injunctive relief because she could use the equity in her home as a bond required under Colorado law. Colo.R.Civ.P. 65 & 121, Section 1-23(3). Ordinarily, debtors who are being foreclosed have no or insufficient equity in their homes and have no other assets to post a bond to stop the foreclosure. Once the property goes to sale, the right to cure is lost, and the debtors will almost certainly lose their homes and be evicted therefrom.

The Question Presented for Review to this Court is crucial to the protection of Ms. Edwards' rights in her case. The necessity of filing for injunctive relief has caused her to incur thousands of dollars in legal fees to stop the foreclosure. Under Colorado law, she has no mechanism to recover these fees, either from the mortgagee or its counsel. The FDCPA provides the sole remedy to make her whole if she is successful in prevailing on the merits of her claim that the amount necessary to cure the default is less than that claimed by the mortgagee's counsel. Should this Court reject the majority of decisions out of lower courts, which hold that attorneys are subject to the FDCPA, even in the performance of traditional "legal" activities, Ms. Edwards will "win the battle but lose the war"; it will cost her more to protect her legal rights than it would to pay an amount which she is not legally obligated to pay.

SUMMARY OF ARGUMENT

The exemption provided to attorneys from being subject to the requirements of the FDCPA was lifted in 1986. In so doing, Congress placed attorneys on equal footing with traditional collection agencies in terms of control over what they can and cannot do in their attempts to aid creditors in the collection of obligations owed by consumers. The language which remained after the lifting of the exemption was clear and unambiguous; there was no language which indicated that attorneys were to be treated any differently than any "debt collector." Nor has Congress ever made a distinction between traditional "debt collection" and traditional "legal" activities in any portion of the FDCPA.

ARGUMENT

When Congress removed the attorney exemption from the FDCPA in 1986, it simply repealed 15 U.S.C. §1692a(6)(F), which provided:

> The term [debt collector] does not include any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client.

By doing so, Congress took the clear and unambiguous position that attorneys-at-law were thereafter subject to *all* provisions of the FDCPA. It could have, but did not, limit those activities to which attorneys would be subject when the exemption was lifted.

The FDCPA has restrictions which govern traditional "debt collection" activities, as well as traditional "legal" activities. The most obvious one is the venue protections afforded by 15 U.S.C. §1692i. This statute specifically prohibits the filing of "legal actions" in distant forums because such filings substantially increase the risk that consumers will be subject to default judgments. If this Court were to answer the Question Presented for Review in the negative, attorneys collecting debts against consumers would once again be allowed to return to their prior activities of filing actions in distant forums which may be permissible under state law but prohibited under the FDCPA.[2]

The problem of distant forum abuse was addressed by the Colorado Supreme Court in *Shapiro and Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). Under Colorado law, a court proceeding to authorize a foreclosure sale could be brought in any county in the state, regardless of the situs of the property. Colo.R.Civ.P. 120(f) (as it existed prior to the 1991 amendment changing the venue provision to

---

[2] In fact, this was the primary reason for the repeal of the attorney exemption. The American Collectors Association presented the following attorney's advertisement in its testimony to the Consumer Affairs Subcommittee of the House of Representatives:

> Collection agencies are governed by the Fair Debt Collection Practices Act which requires that suit be filed in the county of the debtor's residence. *As an attorney, I am exempt from this Act*, . . . We do not have to refer your accounts to other counties which usually involves . . . further delays and expenses, travel (of attorney and witnesses) to other counties in the event of trial or other court hearings. (Emphasis added).

H.R. Rep. No. 99-405, 99th Cong. 2nd Sess., *reprinted in* 1986 U.S. Code Cong. & Ad. News 1766.

comply with the FDCPA). A class action had been commenced against three law firms whose activities primarily involved large volumes of foreclosures, because it was their common practice to commence such proceedings in the county where their offices were, regardless of the situs of the property. The supreme court was called upon to determine whether the Colo.R.Civ.P. 120 procedure was subject to the venue provision of the FDCPA and whether the attorneys were "debt collectors." The trial court had answered in the negative on both issues. The Colorado Court of Appeals, in *Zartman v. Shapiro and Meinhold*, 811 P.2d 409 (Colo.App. 1990), reversed the trial court on both issues.

The Colorado Supreme Court chose not to review the issue of the applicability of the FDCPA to Colo.R.Civ.P. 120 proceedings but did grant certiorari to review the holding that the attorneys, who only performed traditional "legal" activities, were subject to the FDCPA. This is the same issue before this Court, and the lawyer-defendants in that case made the identical arguments raised here. They attempted to turn legislative construction on its head by claiming that the legislative history and informal position taken by the Federal Trade Commission staff created an ambiguity in the legislation which was otherwise absent. The Colorado Supreme Court saw through this fallacious reasoning and held that the statute makes no distinction which would exempt lawyers performing traditional legal activities from the FDCPA.

In reaching its decision, the court first applied the proper rules of statutory construction to the removal of the attorney exemption. In a slightly different twist from

that presented in the present case, the attorneys first argued that, because their principal business was the enforcement of security interests through foreclosure, they were only subject to the FDCPA restriction found in 15 U.S.C. §1692f(6), which provides:

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> Taking or threatening to take any nonjudicial action to effect dispossession . . . of property. . . .

The attorneys claimed that, when read in conjunction with language contained in 15 U.S.C. §1692a(6),[3] the venue provision of 15 U.S.C. §1692i did not apply to them.

The Colorado Supreme Court concluded that the FDCPA and the lifting of the attorney exemption resulted in a clear and unambiguous law which was not subject to interpretation:

> A plain reading of section 1692a(6) indicates that any person who qualifies under the first sentence in the definition is a debt collector for purposes of the FDCPA. . . . If Congress had intended to exempt one whose principal business is the enforcement of security interests, it

---

[3] The language cited by the attorneys is as follows: "For the purpose of section 808(6) [15 U.S.C. § 1692f(6)], such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests."

> would have provided an exemption in plain language.

Shapiro and Meinhold, supra at 124. Likewise, had Congress intended that attorneys only be subject to the FDCPA if they were performing traditional "debt collection" activities, it would have provided plain language to that effect. The absence of any such language distinguishing the types of collection activities conducted by attorneys which would be subject to the FDCPA mandates a finding by this Court that attorneys are subject to the Act regardless of the nature of their activities.

Even if the lifting of the attorney exemption created an ambiguity, rules of statutory construction require that the FDCPA be liberally construed to carry out its remedial purpose. The Colorado Supreme Court, in addition to finding the FDCPA to be clear and unambiguous, proceeded to address and reject some of the concerns which are now being raised by the attorneys in the present case:

> If the definition of debt collectors is construed liberally, with the remedial purpose of the statute in mind, the attorneys are not exempt merely because their collection activities are primarily limited to foreclosures. The section 1692a(6) definition of the term debt collector includes one who "directly or indirectly" engages in debt collection activities on behalf of others.

Shapiro and Meinhold, supra at 124. The Colorado Supreme Court followed the reasoning and holding of *Crossley v. Lieberman*, 868 F.2d 566 (3rd Cir. 1989), that attorneys are subject to the FDCPA, even where their activities are traditionally "legal" in nature. *See also Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Strange v. Wexler*, 796 F.Supp. 1117 (N.D.Ill. 1992); *Kolker v. Sanchez*, CCH No. 46,774 (D.N.M. 1991); *Littles v. Lieberman*, 90 B.R. 700 (E.D. Pa. 1988); *Stewart v. Salzman*, CCH No. 44,333 (D. Conn. 1987).

Although the argument that traditional "legal" activities are not subject to the FDCPA seems attractive at first, abuses involving these activities are far more dangerous to the rights of consumers. The purpose of the FDCPA cannot be disputed; it was intended to insure that debt collectors do not use unfair tactics in the collection of debts. Because consumers are generally less sophisticated, they are more susceptible to forfeiting legal rights when abuse is involved. When the abuse occurs during a traditional "legal" activity, the consumer is at the greatest risk of loss. *e.g., Strange, supra* (where a consumer may have default judgment entered for attorney's fees where they are pled but no legal basis exists); *Kimber v. Federal Financial Corp.*, 668 F.Supp. 1480 (M.D. Ala. E.D. 1987) (where a consumer is likely to have judgment entered against him where a suit is filed after the statute of limitations has run on the claim); *Shapiro & Meinhold, supra* at 125 (where a consumer is likely to default in defending against a foreclosure where the proceeding is commenced in a distant forum).

It is important that the lifting of the attorney exemption guarantee consumers all of the legal protections provided by the FDCPA regardless of whether the creditor is represented by a collection agency or an attorney. The ramifications of abusive activities are identical, regardless of who is attempting to collect the debt. When Congress decided that the FDCPA was only applicable to persons

collecting the debt of another, there was good reason for such a distinction; creditors generally try to preserve their good name and reputation with their customers and are therefore less likely to undertake abusive tactics. Attorneys, on the other hand, have no such reputation to protect and are therefore just as likely as a collection agency to undertake those activities which are prohibited by the FDCPA and which are likely to result in the recovery of their client's money. The plain and unambiguous language of the FDCPA should be preserved. This Court should not undertake judicial legislation and leave the task to Congress should it subsequently choose to limit the extent of the lifting of the attorney exemption to traditional "debt collection" activities.

CONCLUSION

The majority of courts called upon to decide the extent to which attorneys are subject to the FDCPA have reached the conclusion that Congress made no distinction between traditional "debt collection" and "legal" activities when the attorney exemption was repealed. Although regulation of the practice of law is generally reserved to the courts, there are numerous examples of restrictions placed on attorneys conducting traditional "legal" activities by legislation. If this Court follows the basic rules of statutory construction, it can reach no other conclusion but that attorneys who exclusively prosecute litigation against consumers must live by the same rules imposed by the FDCPA as anyone collecting the debt of

another, regardless of whether they do so under the title of "collection agency" or "attorney-at-law."

Respectfully submitted,

STONE, SHEEHY, ROSEN & BYRNE, P.C.

ANDREW ROSEN
Attorneys for Sherry Ann Edwards
1881 9th Street #105
Boulder, CO 80302
Telephone (303) 442-0802

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Fair Debt Collection Practices Act

Other

LEGISLATIVE HISTORY

ADMINISTRATIVE MATERIALS

MISCELLANEOUS

INTEREST OF *AMICI CURIAE*

Johnnie Mae Johnson is a resident of Chicago with a pending claim raising the identical issue to the one in this case of whether Congress intended the courts to create an exemption under the Fair Debt Collection Practice Act for the collection activities of lawyers that involve court processes.

The National Consumer Law Center, Inc. is a non-profit corporation established in 1969 to carry out research, education and litigation regarding significant consumer matters. The Center has as one of its primary objectives the provision of assistance to attorneys in advancing the interests of their low-income clients in the area of consumer law.

The activities of the National Consumer Law Center, Inc., have included research and providing expertise on

consumer law for legal services attorneys, the Congress of the United States, state legislatures, and state and local offices charged with the enforcement of consumer protection acts; participation as counsel, co-counsel, *Amicus Curiae* in litigation throughout the country; and sponsorship of and participation in conferences designed to provide continuing education for legal services and private attorneys. The Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (1988), has been a major focus of the work of the Center. The Center publishes *Fair Debt Collection* (2d ed. 1989 & 1994 Supp.), a treatise of over 750 pages in length to assist attorneys who deal with consumer debt collection problems. In addition, the Center has directly assisted attorneys in scores of cases arising under the Fair

Debt Collection Practices Act. The Center was active in the passage of the FDCPA, testifying at hearings, and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs prior to the Act's passage. The Center's article on attorney coverage under the FDCPA was cited as authoritative in *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

The Legal Assistance Foundation of Chicago ("LAFC") is the principal provider in Chicago of free legal services in civil law matters to individuals who are unable to afford private legal counsel. The mission of LAFC is to provide the poor of Chicago with access to justice and equal justice in civil legal matters. Each year LAFC lawyers represent thousands of

individuals with consumer-related problems. Many of these cases involve a wide range of collection abuses by collection agencies and collection attorneys. LAFC has litigated numerous cases involving the FDCPA, and is currently representing Johnnie Mae Johnson and thousands of other consumers in a federal FDCPA class action now pending in the Northern District of Illinois.

The American Association of Retired Persons (AARP) is a not-for-profit membership organization of more than 34 million people aged 50 and older. As the largest organization in the United States serving older people, AARP seeks to (a) enhance the quality of life for older people; (b) promote independence, dignity, and purpose for older people; (c) advance the role and place of older

people in society; (d) sponsor research on physical, psychological, social, economic and other aspects of aging; and (e) ensure that the rights of older people are protected through the implementation and enforcement of federal and state laws and regulations.

Studies by AARP and others identify older people as being more vulnerable than younger people to consumer fraud and less wary than younger people about the existence of deceptive practices in a wide variety of businesses. Moreover, they are considerably less aware of their rights than are younger people, and less assertive in seeking redress for grievances or dissatisfaction. *See, e.g.*, American Association of Retired Persons, *A Report on the 1993 Survey of Older Consumer Behavior* at 4 (1993), H. Keith Hunt, *Consumer Satisfaction,*

Dissatisfaction, and Complaining Behavior, in 47 J. of Social Issues 107, 111 (Monroe Friedman, ed. 1991). In addition, the "core values" of people aged 50 and above, particularly those 70 and older, include obedience to authority figures. *See* Yankelovich Partners, Inc., *The AARP Membership: Looking to the Year 2000 with a Generational Perspective*, at 12 (1994).

These findings underscore the need to ensure that the rights afforded by consumer protection laws such as the Fair Debt Collection Practices Act are not weakened. AARP's constituents are, as a group, less likely than others to be aware of their right to be free of harassment and other abusive practices in the debt collection process. Their overall vulnerability may make them more likely to fall prey to misleading

statements and scare tactics, and to subject them to greater emotional and physical distress in the face of harassment or abusive practices. When such misconduct occurs, they are unlikely to know that these practices may be illegal, that they have alternatives to complying with payment demands, and that they have the right to seek relief. The situation may be somewhat exacerbated when an attorney is collecting the debt, because a higher percentage of people 50 and older, as compared with younger people, place a great deal of confidence in the advice of lawyers, and older people are more likely to "play by the rules." *Id.* at 29, 60.

AARP has recognized the importance of protecting older people from unfair debt collection practices. The Association believes that the FDCPA

already protects consumers from "unscrupulous and unreasonable tactics of credit collection agencies and *the actions of law firms* hired to collect the debts" (emphasis added), and supports extending the law's protections to collection practices not currently covered by the law, i.e., a creditor's in-house collection activities. *See* AARP *Toward a Just & Caring Society: The AARP Public Policy Agenda* at 321-22 (1994).

The National Association of Consumer Advocates, Inc. was formed in response to the widely expressed belief that an organization of law professors and students, private and public sector attorneys, and legal services attorneys whose primary practice involved the promotion of consumer justice, was needed. Its purpose is to promote communications and information sharing

between consumer attorneys across the country and to serve as a voice for consumers.

Amici will address the issue of whether the defendant attorneys are debt collectors as defined by the Fair Debt Collection Practices Act, 15 U.S.C. § 1692a(6). This issue is of special importance because it will determine the responsibilities of many attorneys who pursue debts for their clients. Thus, the decision of this Court will affect hundreds of attorneys and thousands of consumers nationwide. It is of importance also because it involves a serious question concerning the purposes of the Fair Debt Collection Practices Act.

SUMMARY OF ARGUMENT

The plain meaning of the federal Fair Debt Collection Practices Act requires this court to find the Petitioners to be debt collectors subject to the requirements of the FDCPA. The FDCPA's definition of debt collector explicitly states that where one's "principal purpose" is the collection of debts or where one "regularly" collects debts directly or indirectly for another, one is a debt collector. 15 U.S.C. § 1692a(6). This is a broad, all-encompassing approach that directly refutes the Petitioners' assertion.

The Act's own internal structure leaves no question that litigation activities are covered. Several specific provisions address litigation activities directly, and others only have application, and therefore only make

sense, if litigation efforts are otherwise regulated by the Act.

The legislative history outlines the exclusions to the Act's definition of debt collector. None of the numerous specific exclusions includes a broad exemption for litigation activities, and the inclusion of limited litigation-related exceptions (*e.g.* an exemption for process servers) only reinforces the fact that litigation activities are otherwise covered. Congress has stated: "The Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act . . . Distinctions between attorney debt collectors and lay debt collectors are eliminated by the [amendment]." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754.

The Petitioners rely on a post-enactment statement made by Representative Annunzio three months after the passage of the amendment. The Court does not rely on such remarks as an expression of Congressional intent. *See* e.g., *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979).

The Petitioners are concerned with "absurd outcomes" if the decision below is not reversed. None of these "absurd outcomes" is necessary, and furthermore none has been realized under the Act. The FDCPA has raised the plane on which debt collectors compete to one based on ethical debt collection standards, a fundamental goal specified in the Act itself. 15 U.S.C.§ 1692(e). The Congressional purpose should be upheld by affirming the decision below.

I. THE PLAIN MEANING OF THE FAIR DEBT COLLECTION PRACTICES ACT REQUIRES THIS COURT TO FIND THE PETITIONERS TO BE DEBT COLLECTORS SUBJECT TO THE REQUIREMENTS OF THE FDCPA

A. INTRODUCTION

The specific question addressed subsumes two threshold issues. First is the general issue of whether the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o [hereinafter the "FDCPA" or the "Act"] provides any exemption for consumer debt collection activities performed by an attorney. This question must be answered in the negative, in view of the 1986 FDCPA amendment, P.L. 99-361, 100 Stat. 768 (July 9, 1986). This amendment deleted the original exemption which had excluded from FDCPA coverage "any attorney-at-law collecting a debt as an attorney on behalf of and in the name of a client." This action unequivocally demonstrates both the statute's effect

and Congress' intent to eliminate all distinctions between lay and attorney debt collectors.

The second preliminary issue is whether the FDCPA applies to activities conducted in debt collection litigation. Again, the Act's own internal structure leaves no question that the Act covers these activities. Several specific provisions address litigation activities directly, and others only have application, and therefore make sense, if litigation efforts are otherwise regulated by the Act.

Since the FDCPA applies both to attorney debt collectors as well as to unlawful collection practices committed in the course of litigation, there is no basis whatsoever for Petitioners' asserted position to the contrary. Congress has chosen to regulate,

explicitly and intentionally, attorney litigation activity. Petitioners ask nothing less than that this Court nullify through judicial interpretation a knowingly made legislative policy decision.

B. REPEAL OF THE ATTORNEY EXEMPTION

Congress clearly extended its authority to regulate collection attorneys when, on July 9, 1986, it amended the FDCPA to repeal the limited attorney exemption.[1] The amendment literally consisted of deleting one sentence and renumbering the affected portion of the Act.[2] Congress' action

---

[1] 15 U.S.C. § 1692a(6)(F) (Supp. II 1979).

[2] "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That (a) The last sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended-

(continued...)

was spurred by, among other things, collection attorneys advertising their FDCPA exemption to their commercial advantage over regulated debt collectors.[3] The sentence that Congress chose to delete from the Act's definition of debt collector previously had exempted "any attorney-at-law collecting a debt as an attorney on behalf of and in the name

[2](...continued)
(1) by striking out clause (F) and redesignating clause (G) as clause (F); and
(2) in clause (E), by inserting 'and' at the end thereof.
(b) The second sentence of section 803(6) of the Fair Debt Collection Practices Act (15 U.S.C. 1692a(6)) is amended by striking out 'clause (G)' and inserting in lieu thereof 'clause (F).'" P.L. No. 99-361, 100 Stat. 768.

[3] *Oversight Hearing on FDCPA and H.R. 4617 Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 2d Sess. (Jan. 31, 1984); *Hearings on H.R. 237, Before the Subcomm. on Consumer Affairs and Coinage of the House Comm. on Banking, Finance and Urban Affairs*, 99th Cong., 1st Sess. (Oct. 22, 1985); H.R. Rep. No. 405, 99th Cong., 1st Sess. (Nov. 26, 1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 132 Cong. Rec. H10534 (daily ed. Dec. 2, 1985) (statement of Rep. Annunzio).

of a client." Subsequent to the repeal of the attorney exemption, twelve circuit court judges have found that the FDCPA's definition of debt collector plainly and unambiguously applies to litigation-related collection activities of attorneys.[4] The removal of the attorney exemption makes clear that the FDCPA applies to attorneys who meet either of the two broadly written prongs of the definition of "debt collector" in 15 U.S.C. § 1692a(6).[5] In fact,

[4] *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *cert. granted*, ___U.S.___ (1994); *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992).

The court in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (per curiam), did not base its contrary decision on the text of the Act or any purported ambiguity in its language.

[5] *See Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Frey v. Gangwish*, 970 F.2d 1516 (6th Cir. 1992); *Carroll v. Wolpoff & Abramson*, 961 F.2d 459 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 298 (1992); *Crossley v.*
(continued...)

Petitioners and their *Amicus* concede this issue. Petitioners' Brief at 10; *Amicus Curiae* Brief of the Commercial Law League of America at pp. 7-8.

C. THE FDCPA APPLIES TO LITIGATION

1. Introduction

It also is clear from the plain meaning of the Act that the FDCPA generally applies to "legal activities,"

[5](...continued)
Lieberman, 868 F.2d 566 (3d Cir. 1989); *Dutton v. Wolhar*, 809 F. Supp. 1130 (D. Del. 1992); *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992); *Stojanovski v. Strobl & Manoogian*, 783 F. Supp. 319 (E.D. Mich. 1992); *Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991); *Littles v. Lieberman*, 90 B.R. 700 (E.D. Pa. 1988); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992), *aff'g Zartman v. Shapiro & Meinhold*, 811 P.2d 409 (Colo. Ct. App. 1990); *Yale New Haven Hosp. v. Orlins*, 1992 WL 110710 (Conn. Super. Ct. 1992).

See also, Zager, FTC Informal Staff Letter (Nov. 10, 1992) *reprinted in* National Consumer Law Center, *Fair Debt Collection* 244 (Supp. 1994).

Cf. Green v. Hocking, 9 F.3d 18 (6th Cir. 1993) (per curiam); *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1127 (S.D.N.Y. 1990); *National Union Fire Ins. Co. v. Hartel*, 741 F. Supp. 1139 (S.D.N.Y. 1990) (law firm is not a debt collector under the FDCPA where the debt was not incurred for a consumer purpose, and the firm only engaged in legal activities, i.e., filing a suit in a distant forum).

including litigation. As discussed more fully below, the Act provides for the proper venue for filing consumer debt collection suits;[6] it provides exceptions to its prohibitions against contacting third parties for enforcement of post-judgment remedies or for communications made with a court's permission;[7] it provides that a post-judgment debt may simply be verified by a copy of the judgment;[8] and it provides that courts may not construe a consumer's failure to dispute the validity of a debt as an admission of liability.[9] These provisions, among others, are consistent with the plain reading of the statute

[6] 15 U.S.C. § 1692i.

[7] 15 U.S.C. § 1692c(b).

[8] 15 U.S.C.§ 1692g(b).

[9] 15 U.S.C. § 1692g(c).

only as applied to litigation activities, whether undertaken by an attorney or a lay debt collector.

Moreover, Congress clearly knew how to provide exemptions to the Act's requirements. The Act has seven explicit exemptions in 15 U.S.C. § 1692a. In addition, there are exemptions for some litigation activities. For example, process servers are expressly exempt. 15 U.S.C. § 1692a(6)(D). Court and other government officials are exempt when performing their legal duties. 15 U.S.C. § 1692a(6)(C). The broad prohibition of contacting unobligated third parties provides an exception for post-judgment judicial remedies or for communications in other court proceedings with the court's permission. 15 U.S.C. § 1692c(b).

Petitioners argue that an invisible portion of the attorney exemption -- an exemption for litigation activities under some circumstances -- remains valid. Petitioners contend that because the FDCPA's broadly written definition of debt collector does not specifically mention litigation, litigation with the sole purpose of collecting a debt should not be considered the direct or indirect collection of a debt. The FDCPA's definition of debt collector explicitly states, however, that where one's "principal purpose" is the collection of debts or where one "regularly" collects debts directly or <u>indirectly</u> for another, one is a debt collector. 15 U.S.C. § 1692a(6). This is a broad, all-encompassing approach that directly refutes the Petitioners' assertion.

Petitioners further argue that because the language of the FDCPA does not address litigation activities, the FDCPA does not apply to them. The underlying assumption of that argument, however, is objectively false. In fact, as discussed above, several provisions of the FDCPA expressly regulate or exempt litigation activities, as conceded by *Amicus*. *Amicus Curiae* Brief of Commercial Law League of America at pp. 8-9. These portions of the Act confirm that Congress intended the FDCPA to apply to litigation efforts and therefore eliminate the statutory basis of the Petitioners' argument.

2. The Wrongful Venue Provision

One of the ways the FDCPA regulates litigation activities is through 15 U.S.C. § 1692i, the wrongful venue

provision, which Petitioners seem to ignore. This provision must be considered, however, because statutory language always must be read in its proper context. *McCarthy v. Bronson*, 500 U.S. 136 (1991). When construing a statute, the Court must look not just at one provision in isolation, but must view that provision in the context of the statute as a whole. *Gozlon-Peretz v. United States*, 498 U.S. 395, 407 (1991).

Section 1692i prohibits a debt collector from bringing a debt collection action in any judicial district other than where the consumer either signed the contract or resides. The choice of venue or forum is a litigation decision. The attorney's decision to file an action in an improper venue is a particularly abusive violation of the FDCPA committed in order to obtain an unfair advantage

over the consumer. Filing the debt collection action in a distant forum increases the incidence of default. It also frequently forces the consumer to agree to unfavorable settlements in order to avoid the burdens of the resulting additional inconvenience. In the latter situation, the consumer must weigh the cost of defending in a distant or inconvenient forum against the amount of the claimed debt and the possible settlement. Defending a case in a distant forum is almost impossible to do *pro se* and requires the consumer to hire an attorney. The motivation for venue violations also may be personal to the attorney. Suing in the proper forum may be inconvenient to the attorney and require him to obtain local counsel, thereby diminishing his fee. Also, attorneys violating the venue provision

almost always bring the action in the forum in which they regularly practice. The well known concept of "home court advantage" thus applies to law as well as basketball.

Wrongful venue FDCPA actions are traditionally brought against the attorney filing the action. *See, Dutton v. Wolmar*, 809 F.Supp. 1130 (D. Del. 1992). However, the Petitioners' theory would leave the attorney debt collector immune from liability even though he made the venue decision and took the action that violated the FDCPA. It is absurd to argue that there is an implicit litigation exemption when that argument necessarily conflicts with the explicit requirements of the Act.

3. Regulation of Other Litigation Activities

In addition to the venue provision, the Act addresses a variety of other litigation activities including, but not limited to, providing exemptions for legitimate servers of process,[10] deceptive threats of legal activities,[11] and false representations that the transfer of any interest in a debt could cause the consumer to lose legal claims or defenses.[12] The FDCPA clearly has applied to litigation activities.

There is no language in the Act that exempts "purely legal" or "litigation" activities. To the contrary, the plain language of the FDCPA requires that this Court find Petitioners to be debt

[10] 15 U.S.C. § 1692a(6)(D).

[11] 15 U.S.C. §§ 1692e(4), 1692e(5).

[12] 15 U.S.C. § 1692e(6).

collectors subject to the requirements of the FDCPA.

II. THE LEGISLATIVE HISTORY OF THE FDCPA SHOWS THAT CONGRESS DID NOT INTEND AN EXEMPTION FOR LITIGATION ACTIVITIES

A. INTRODUCTION

Petitioners argue that the definition of debt collector has an implicit exemption for attorneys engaged in "purely legal activities." Because the plain language of the Act is clear and unambiguous, it is unnecessary to examine the legislative history. *Howe v. Smith*, 452 U.S. 473, 483 (1981). Even if such a task were appropriate, the legislative history supports a finding that the Act protects consumers from false, deceptive and unfair litigation activities.

B. LEGISLATIVE HISTORY OF THE FDCPA

Congress passed the FDCPA to give even the least sophisticated consumers the ability to defend themselves against abusive or deceptive debt collectors. *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993). Congress recognized that "one of the most frequent fallacies concerning debt collection legislation is the contention that the primary beneficiaries are 'deadbeats.'" S. Rep. No. 382, 95th Cong. 1st Sess. 3 (1977) *reprinted in* 1977 U.S.C.C.A.N. 1695, 1697. In fact, Congress relied on several studies which found that "the vast majority of consumers fully intend to repay their debts." *Id.* Congress recognized that consumer debtors overwhelmingly are ordinary citizens who have encountered "an unforeseen event

such as unemployment, overextension, serious illness, or marital difficulties or divorce." *Id.* As the Senate Report on the Act points out, prior to the enactment of the FDCPA, the majority of American consumers "ha[d] no meaningful protection from debt collection abuse." *Id.* Therefore, "the serious and widespread abuses in this area and the inadequacy of existing State and Federal laws ma[d]e this legislation necessary and appropriate." *Id.* at 3.

The FDCPA was enacted to redress the false or deceptive representations, the unfair or unconscionable collection methods, the invasion of privacy, and the harassment and abuse to which many consumers were subject. 15 U.S.C. §§ 1692(a), 1692(b), 1692(e). It is clear that in passing the FDCPA, Congress intended to afford consumers broad and

meaningful protections. The FDCPA expressly states that it was premised on the inadequacy of existing law to protect consumers. 15 U.S.C. § 1692(b). In Congress' view, tort law and the limited enforcement resources of the Federal Trade Commission were not enough to provide the necessary consumer protections.

It also is clear from the legislative history that Congress intended a broad definition of debt collector, thus requiring its limited specified exceptions. "The committee intends the term 'debt collector,' subject to the exclusions discussed below, to cover all third persons who regularly collect debts for others." S. Rep. No. 382, 95th Cong. 1st Sess. 2 (1977). The legislative history goes on to outline the exclusions to the Act's

definition of debt collector. None of the numerous specific exclusions includes a full exemption for litigation activities and, as addressed above, the inclusion of limited litigation-related exceptions only reinforces the fact that litigation activities are otherwise covered.

C. LEGISLATIVE HISTORY OF THE FDCPA AMENDMENT REPEALING THE ATTORNEY EXEMPTION

Congress took further action to protect consumers in 1986, by addressing the problem of attorney debt collection. The problem arose because attorneys largely were exempt from FDCPA coverage. Some attorneys capitalized on this exemption by advertising their availability and exemption from the

Act.[13] Thus, faced with a major loophole in the law, Congress determined "that current law does not adequately protect consumers from attorney debt collection abuses and that repeal of the attorney exemption to the Fair Debt Collection Practices Act is an appropriate way to reduce the amount of this abuse." H.R. Rep. No. 405, 99th Cong., 1st Sess. 7 (1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 1758.

The legislative history requires the conclusion that Congress, in amending the Act to repeal the attorney exemption, intended to extend FDCPA coverage to all attorneys regardless of the "type" of activity in which they were engaged. In introducing the amendment to the FDCPA,

[13] H.R. Rep. No. 405, 99th Cong., 1st Sess. 5 (1985) *reprinted in* 1986 U.S.C.C.A.N. 1752, 1756.

Congressman Annunzio stated that "any attorney who collects debts on behalf of a client shall be subject to the provisions of [the FDCPA]. . . . The rules governing debt collection practices ought to apply evenly to all debt collectors, whether the collector is an attorney or not." 31 Cong. Rec. H226 (daily ed. Jan. 31, 1985). The House Report which accompanied this statement provided: "The Committee intends that attorneys in the business of collecting debts be subject to all provisions of the Act . . . . Distinctions between attorney debt collectors and lay debt collectors are eliminated by the [amendment]." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754. It is clear that the FDCPA applies to attorneys, and that the Act makes no distinction as to the type of

debt collection activity in which an attorney is engaged.

D. THE COURT SHOULD NOT GIVE WEIGHT TO CONGRESSMAN ANNUNZIO'S POST-ENACTMENT STATEMENT

The legislative proceeding on which the Petitioners primarily rely is a post-enactment statement made by Representative Annunzio three months after the passage of the amendment. The Court may not rely on these remarks as an expression of congressional intent. *See, e.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979). This Court has recognized that

> isolated statements by individual Members of Congress or its committees, all made after the enactment of the statute under consideration, cannot substitute for a clear expression of legislative intent at the time of enactment . . . . Nor do these comments, none of which represents the will of Congress as a whole, constitute subsequent

> 'legislation' such as the court might weigh in construing the meaning of an earlier enactment. (Citations omitted).

Southeastern Community College v. Davis, 442 U.S.397, 411 n. 11 (1979).

Congressman Annunzio's post-enactment statement is not convincing evidence that Congress, rather than repealing the attorney exemption, intended to replace it with a "sometimes litigation exemption." Moreover, Congressman Annunzio's post-enactment statement differs significantly from his earlier explanation of the amendment on which Congress as a whole relied in approving the amendment. This Court should not misinterpret Congressman Annunzio's post-enactment statement as the intent of the legislature when it repealed the attorney exemption.

III. THE SECOND, FOURTH, SEVENTH, AND NINTH CIRCUITS, AS WELL AS THE COLORADO SUPREME COURT, HAVE REJECTED THE NOTION OF CREATING A "PURELY LEGAL" ACTIVITIES EXEMPTION

Because the FDCPA applies to both attorney debt collectors and to unlawful practices committed in the course of collection litigation, it is not surprising that no one has ever suggested a textual basis for the proposition that there is an exemption for activities conducted by collection attorneys who routinely engage in litigation. Indeed, the Second, Fourth, Seventh, and Ninth Circuits, as well as the Colorado Supreme Court, each has stated that unlawful collection efforts conducted by attorneys in the course of litigation violate the FDCPA. *Paulemon v. Tobin*, 30 F.3d 307 (2d Cir. 1994); *Scott v. Jones*, 964 F.2d 314 (4th Cir. 1992); *Jenkins v. Heintz*, 25 F.3d 536 (7th Cir. 1994), *cert.*

granted, ___ U.S. ___ (1994); *Fox v. Citicorp Credit Servs., Inc.*, 15 F.3d 1507 (9th Cir. 1994); *Shapiro & Meinhold v. Zartman*, 823 P.2d 120 (Colo. 1992). Each of these decisions is founded on the acknowledgment that the 1986 amendment eliminated any distinctions between lay and attorney debt collectors and, therefore, that an attorney debt collector, just as any other debt collector, is liable for unlawful conduct committed in the course of litigation.

The only federal appellate court to hold to the contrary is the Sixth Circuit, in *Green v. Hocking*, 9 F.3d 18 (6th Cir. 1993) (per curiam). *Green* employs a fundamentally flawed methodology and analysis, a conclusion which is underscored by the refusal of appellate courts which subsequently have been confronted with the identical legal

question to follow its analysis or adopt its holding. The *Green* opinion explicitly eschews "a literal reading of the statute" in order to reach its stated result and avoid what it perceives as "absurd outcomes." 9 F.3d at 20-21. As even the Sixth Circuit itself recognized, however, in rejecting a similar argument presented in another FDCPA case, both the judiciary and the litigants "are bound by the plain language of the act." *Frey v. Gangwish*, 970 F.2d 1516, 1518 (6th Cir. 1992). To be sure, under very limited circumstances, an ambiguous statute may properly be re-crafted through judicial interpretation to alter statutory language which is at odds with a clearly-expressed contrary intention. The formal legislative history of the FDCPA, however, requires the rejection of the Petitioners' argument. Moreover, the

"absurd outcomes" mentioned by the *Green* opinion are based on a misunderstanding of the FDCPA's requirements.

IV. APPLICATION OF THE FDCPA TO NORMAL AND LEGITIMATE DEBT COLLECTION ACTIVITIES DOES NOT PRODUCE "ABSURD OUTCOMES"

A. OUTCOMES INVOLVING A "COMMUNICATION" UNDER 15 U.S.C. § 1692c AND § 1692g

The *Green* opinion concerns itself with two "absurd outcomes": the consumer's ability to stop the prosecution of a collection suit if the consumer disputes the amount owed or requests that communications between the consumer and the debt collector cease; and the notion that if a consumer prevails on an issue in a collection case, the collector has violated the Act. 9 F.3d at 21. None of these outcomes is realized under the FDCPA.

Green cites 15 U.S.C. § § 1692g and 1692c(c) as sources of the purported absurd outcomes. Both of these sections pertain as the Sixth Circuit stated, to the use of a "communication." 9 F.3d at 21. *Amici* agree that each of the recited outcomes is absurd, but none of them is a necessary consequence of the contrary holding. The FDCPA does not prohibit any of the normal litigation activities which the Sixth Circuit identified, regardless of whether attorney litigation activities are covered or exempt.

The linchpin of the "absurd outcomes" identified in *Green* is that the FDCPA prohibits a debt collector from communicating with the consumer or third parties under certain circumstances described in 15 U.S.C. §§ 1692c and 1692g. However, these prohibitions would not interfere with normal litigation

practices, as *Green* posits, since none of the identified litigation practices constitutes a "communication," defined in 15 U.S.C. § 1692a(2) as follows:

> the conveying of information regarding a debt directly or indirectly <u>to any person</u> through any medium. (Emphasis added).

A court is not a "person" under this definition. 1 U.S.C. § 1 (Person defined to mean "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.") When Congress intends a "person," as used in a particular statute, to include additional entities, including a governmental agency such as a court and its personnel, it so states explicitly. *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. § 1691a(f); Fair Credit Reporting Act, 15 U.S.C. § 1681a(b). Neither filing a

complaint or other pleadings nor communicating with court personnel constitutes a "communication" under the FDCPA, as the Federal Trade Commission staff acknowledged six years ago. 53 Fed. Reg. 50097, 50100 (December 13, 1988) ("[F]iling or service of a complaint or other legal paper . . . is not a 'communication' covered by the FDCPA").[14]

The same conclusion attains pursuant to 15 U.S.C. § 1692c(b), which generally prohibits third party communications in connection with the collection of any debt, but which exempts from that

[14] Although not identified in *Green's* list of "absurd outcomes," *Amici* are well aware that the attorney debt collection industry has been arguing (although a court has never so held) that a debt collection complaint must include the § 1692g(a) and § 1692e(11) notices if *Green* is not correctly decided. Similarly, though, since a pleading is not a "communication" as defined, neither disclosure requirement is applicable irrespective of how the attorney litigation issue is resolved.

prohibition any communication undertaken with "the express permission of a court of competent jurisdiction." Even if any of the various activities identified in *Green* were deemed to constitute a "communication" as defined, each of the normal events associated with filing and prosecuting litigation is subject to this exception.

Furthermore, 15 U.S.C. § 1692c(c) will not curtail litigation as the *Green* court suggests. Section 1692c(c) prohibits dunning - not notices of specified remedies, which are specifically authorized under § 1692c(c)(3). The FDCPA requires that when a consumer invokes § 1692c(c), debt collectors may no longer request payment; debt collectors may, however, pursue legal remedies and notify the consumer of the specific remedies (e.g. motions for

summary judgment, interrogatories, notice).[15]

1. The FDCPA Imposes No Liability By Virtue of Merely Not Prevailing in a Collection Suit

We have no inkling of the basis for the Sixth Circuit's assumption that a

[15] If the "absurd outcomes" identified by the Sixth Circuit were conceivable, an appropriate judicial interpretation merely would remedy the defective portion of the statute while retaining the language which is faithful to congressional intent. *See, e.g., Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). The *Green* decision accomplishes neither goal. Simply eliminating attorney litigation activities maintains the identical purported absurdities when committed by a collection agency engaged in collection litigation. In addition, insulating attorney collectors from liability for misconduct which is actionable when committed by lay collectors is directly contrary to the sole purpose of the 1986 amendment - eliminating all distinctions between the two groups. The alleged outcomes are equally absurd regardless of whether the underlying activities are committed by law firms or collection agencies, and the *Green* solution to its perceived phantom problems therefore is inappropriate in all circumstances. The proper solution - if there were a problem to solve - is the FTC staff's conclusion that normal collection litigation activities do not constitute "communications." In this manner, the clear directive of the FDCPA to bar unlawful means to collect a consumer debt - whether committed by an attorney or a lay collector and whether committed in the course of collection litigation or informal collection efforts - is preserved.

contrary ruling would subject attorneys to FDCPA liability if the relief granted in collection litigation is in some manner less than that requested in the complaint. 9 F.3d at 21. In fact, no court has ever imposed FDCPA liability on an attorney or lay collector under such a theory.

As illustrated by the holdings in the instant case at the circuit court level, as well as in *Strange v. Wexler*, 796 F. Supp. 1117 (N.D. Ill. 1992), the potential liability of a collection attorney under § 1692e is in no manner as broad as assumed by the Sixth Circuit's per curiam opinion. In *Strange*, the attorney was found liable not simply for demanding an award of attorney fees for which the consumer was not liable; the actionable misconduct was based on the fact that the attorney's overreaching

resulted from his complete failure to investigate the facts or law of the case prior to instituting the litigation. He filed suit through "a mass-production approach to collection litigation" without any regard for his own ethical and professional responsibilities. 796 F. Supp. at 1119-20; *compare, Clomon*, 988 F.2d at 1320, 1321 (2d Cir. 1993). Similarly, in the instant case, Ms. Jenkins has specifically alleged that "Heintz and his law firm knew the insurance charge was unauthorized, but tried to pass it off anyway." 25 F.3d at 540. So long as an attorney abides by the ethical standards of the profession and exercises appropriate diligence in investigating the facts and law of a case, § 1692e imposes no liability simply because a claim is ultimately found wanting.

Furthermore, no liability attaches for any violation of the FDCPA where the attorney (or any other debt collector) can establish the elements of the good faith clerical error affirmative defense set out in 15 U.S.C. § 1692k(c). And, rather than being an "absurd outcome," each of the reported cases where an attorney has been found liable for unlawful litigation activities illustrates the precise result Congress intended, as shown by the following quotation from *Strange*:

> Wexler may have believed it was not in his interest to examine his cases carefully to determine whether he was entitled to attorney's fees from the debtor. A defendant debtor appearing in court without an attorney would be unlikely to know he was not liable for fees and the judge might not catch Wexler's overreaching; if the defendant defaulted, the judgment would probably include the fees.

> One purpose of statutory damages is to create an incentive to obey the law. It appears Wexler needs an incentive either to pay more attention to the complaints he files, or, taking another view, to dissuade him from taking advantage of debtors who do not know their rights. 796 F. Supp. at 1120.

Neither violating the venue provision of the FDCPA nor knowingly misrepresenting the relief to which a client is entitled interferes in any manner with that legitimate undertaking. Such misconduct is unfair, deceptive, oppressive, and indeed unethical, and therefore, as this Court has long recognized, the proper object of curtailment under federal law. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 n.5 (1972); *See also* 131 Cong. Rec. H10535 (daily ed. Dec. 2, 1985) ("I should also point out that what we are asking lawyers to do is not very

complicated. We only want them to operate in an ethical way.") (remarks of Rep. Annunzio).[16]

2. Outcomes Encouraging Creditors to Hire Under-Qualified Attorneys

The American Bar Association's *amicus* brief suggests that the FDCPA's coverage of litigation activities discourages creditors from hiring lawyers who regularly engage in the collection of debts. The FDCPA has applied without limitation to attorneys since 1986. Prior to the repeal of the attorney exemption, there were "5,000 practicing attorneys in the United States who handle[d] consumer collection accounts on

---

[16] The acknowledgement by NARCA (Brief of *Amicus Curiae* National Association of Retail Collection Attorneys at pp. 12-13) of the "egregious attorney misconduct" committed by the Petitioners only underscores the vital importance of fulfilling the explicit congressional goal of the 1986 amendment to provide victims an adequate remedy for unethical attorney collection behavior.

a regular basis, or a number approximately equal to the total lay collection industry." H.R. Rep. No. 405, 99th Cong., 1st Sess. 3 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1752, 1754. Neither the ABA, the Petitioners, nor the other *Amici* involved in this case has presented any evidence that following the repeal of the attorney exemption, the number of collection attorneys has plummeted as creditors scramble to find attorneys who engage in debt collection in isolated instances only. On the contrary, the statements of interest by both the National Association of Retail Collection Attorneys and the Commercial Law League of America indicate that collection attorneys are prospering.

When Congress repealed the attorney exemption, creditors were not forced to seek out unqualified attorneys to avoid

FDCPA liability. It would seem that quite the opposite occurred. Creditors sought out qualified attorneys with training in collections who would comply with the FDCPA. Typical creditors, which hire collection attorneys to file hundreds or thousands of collection suits each year, are hardly likely to negotiate separate contracts with scores of inexperienced attorneys to file their collection actions to guard against the minuscule risk of an experienced lawyer's liability for an FDCPA violation.

V. THE FTC STAFF COMMENTARY ON THE FDCPA'S COVERAGE OF THE PURELY LEGAL ACTIVITIES IS AT ODDS WITH THE PLAIN LANGUAGE OF THE FDCPA

The *Green* opinion also relies on the Federal Trade Commission Staff Commentary as supporting an exemption for lawyers engaging only in purely legal activities. Because the FTC staff's interpretation

conflicts with the plain language of the Act, it must be rejected. *Brown v. Gardner*, ___ U.S. ___ (1994). Furthermore, the FTC staff's Commentary was not adopted by the Commission, "does not have the force of a trade regulation rule or formal agency action, and . . . is not binding on the Commission or the public." 53 Fed. Reg. 50097 (Dec. 13, 1988). The FTC is prohibited from promulgating regulations for the FDCPA. 15 U.S.C. § 1692l(d). The FTC has declined to exercise its authority to issue advisory opinions under the FDCPA. *See* 15 U.S.C. 1692k(e). Because of the conflict with the language of the Act, the FTC's lack of rulemaking authority, and the Commission's failure to adopt its staff's interpretations, this is not a case where judicial deference is owed to an administrative agency or its staff.

Cf. Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980).[17]

The FTC Staff Commentary also offers no solace to the Petitioners because they admit that attorney Heintz does act as a debt collector.[18] The Staff Commentary does not take the sometimes covered, sometimes not approach of the Petitioners.[19] Since they engage in traditional debt collection activities, the Petitioners became "debt collectors" even under the FTC staff analysis.

---

[17] The FTC staff position relies on the same post-enactment remarks of a single congressman on which the Petitioners rely. *See* McPhee, FTC Informal Staff Letter (Nov. 17, 1986), *reprinted in* National Consumer Law Center, *Fair Debt Collection* 583 (2d ed. 1991).

[18] Petitioners' Brief at 11 ("Heintz does not deny that for <u>some</u> clients, on <u>some</u> occasions, he does act as a debt collector").

[19] FTC Staff Commentary, 53 Fed. Reg. 50097, 50100, 50102 (Dec. 13, 1988).

VI. RESURRECTION OF THE ATTORNEY EXEMPTION FOR LITIGATION ACTIVITIES WOULD HAVE DISASTROUS CONSEQUENCES

Amicus, Johnnie Mae Johnson, is one of two named plaintiffs in *Brewer v. Friedman*, 93 C 971 (N.D. Ill. 1993). *Brewer v. Friedman* is a class action that was consolidated for decision with an individual matter, *Tolentino v. Friedman*, 833 F. Supp. 697 (N.D. Ill. 1993). The district court has granted summary judgment on liability for the plaintiffs in *Brewer*, but the case is stayed pending the outcome of the appeal in *Tolentino v. Friedman*, which was argued before the U.S. Court of Appeals for the Seventh Circuit in December 1994, and is awaiting decision.

Tolentino v. Friedman provides an example of the problems posed by the "litigation activities" exception proposed by Petitioners. In effect,

Petitioners seek to resurrect, by judicial veto, the pre-1986 attorney exemption to the FDCPA repealed by Congress. Although the Act still would apply to attorneys' pre-litigation activities, once a complaint was filed, the curtain would close and the attorneys' "litigation" activities, no matter how abusive, no longer would be subject to FDCPA scrutiny. The defendant's actions in *Tolentino* provide a stark demonstration of how attorneys could function, while collection litigation is pending, in a world unfettered by the FDCPA.

In *Tolentino*, plaintiffs alleged several violations of the FDCPA arising out of defendant's use of a dunning notice entitled "IMPORTANT NOTICE." In response, the defendant-attorney asserted that, irrespective of whether the notice

was abusive or misleading, he was immune because the notice followed the filing of a lawsuit and therefore constituted "litigation activities" exempt from the FDCPA. The underlying facts of *Tolentino* are summarized in the reported decision. 833 F. Supp. at 698-99. The offending notice was not on letterhead and there was no greeting or signature. Instead, as found by the district court, the notice appeared to simulate a court document and to be issued as part of the formal judicial proceeding. *Id.* at 700-701.

On summary judgment, the court rejected all of the defendant's arguments and found four violations of the FDCPA. The notice failed to include the warnings required by 15 U.S.C. § 1692e(11). The notice was also found to be a deceptive means to collect a debt in violation of

15 U.S.C. § 1692e(10). Furthermore, the notice appeared to be authorized, issued or approved by a court and falsely implied that it was part of the legal process in violation of 15 U.S.C. § § 1692e(9) and 1692e(13). *Id.*

The court gave short shrift to Friedman's claim that the notice was a traditional legal activity. "Friedman's use of the notice is distanced from the traditional role of attorney as litigator and has the effect of advancing the financial interest of the creditor through possibly oppressive means." 833 F. Supp. at 700. As the court pointed out, "the Notice is merely one step in Friedman's procedure for debt collection." *Id.* As such,

> Friedman cannot avoid liability by simply including debt collection communications in mailings containing court documents. A different holding

> would allow Friedman to hide behind the characteristic that sets attorneys apart from other debt collectors, which arises from their law degrees: the ability to personally represent the creditor before the court and instigate a suit on its behalf.

Tolentino, 833 F. Supp. at 702.

If the Petitioners' contention is sustained, debt collecting attorneys could follow Friedman's example en masse and attempt to hide behind the cloak of "litigation activities." What previously would have been unlawfully abusive collection letters now would become "settlement" letters.[20] Moreover, all post-filing collection efforts could be construed as settlement efforts. If this Court creates a litigation activities exemption to the FDCPA, the pre-1986

[20] In fact, Friedman himself claimed that the notice which had no greeting, no information specific to the recipient debtor, and was not on letterhead, nevertheless was a "settlement" letter. 833 F. Supp. at 700.

landscape would re-emerge, and collection attorneys would be unfettered by the FDCPA after commencing litigation, to the disadvantage of both reputable collection agencies and consumers.[21] Attorneys would regain their pre-1986 competitive advantage over collection agencies since they would not be subject to the FDCPA after filing suit.[22] Unfortunately, this competitive edge would likely result

[21] Debt collection attorneys argue that FDCPA protection is unnecessary in light of professional ethics standards and judicial sanctions. However, those same ethical standards apply to attorneys' pre-litigation activities, and even the Petitioners do not argue that the FDCPA should not apply to attorney's pre-litigation activities. In addition, Rule 11 would not reach abusive tactics such as the defendant's in *Tolentino*, since approximately half of the states have no Rule 11-type provision and, in any event, the deceptive conduct involved no signed pleadings.

[22] In repealing the FDCPA attorney exemption, "Congress intended to treat attorney and non-attorney debt collectors similarly because the prior legislation could be construed to imply that attorneys could use tactics that collection agencies were prohibited from using." *Dutton v. Wolpoff & Abramson*, 5 F.3d 649, 655 (3d Cir. 1993).

in an increase in litigation, not for the primary purpose of reducing a claim to judgment, but to evade the constraints imposed by Congress on the totality of attorney's collection tactics. Consumers would be subject to the abusive debt collection practices that the Act heretofore prohibited. Under the "amended" FDCPA proposed by the Petitioners, consumers would be confronted by the prospect of simultaneously facing both litigation and abusive collection activities. This result runs counter to the letter and spirit of the FDCPA and should not be countenanced by this Court.

VII. ATTORNEY LITIGATION REGULATION HAS NOT INCREASED THE COST OF CREDIT

Amicus Curiae, Commercial Law League of America, asserts that the effect of Congress' regulating litigation

collection activities under the FDCPA has been to increase the security required for credit and to cause higher interest rates to be charged.[23] The consumer credit industry has made this argument in opposition to every piece of the consumer protection legislation and agency rule which has been enacted in the last twenty years. And it has turned out not to be true. Indeed, the Commercial Law League of America has offered no substantiation at all for its bold assertion.

Since the enactment of the FDCPA, consumer credit in the United States has burgeoned from $298.2 billion to $741.1 billion in 1992.[24] Installment credit finance rates have for the most part

---

[23] *Amicus Curiae* Brief of Commercial Law League of America at 27.

[24] U.S. Dept of Commerce, Statistical Abstract of the U.S. 1993 Table No. 815.

fallen during this period generally in line with general market interest rates.[25] The number of unsecured credit cards jumped from 526 million cards in 1980 to 1.027 billion cards in 1991, and the amount of revolving, generally unsecured, debt increased from $55.1 billion to $243.6 billion.[26] The thirty-day delinquency rates on bank personal loans and bank cards remained fairly constant during the period with unemployment rates generally the factor most highly correlated with fluctuations in delinquencies.[27]

The enactment of the FDCPA and the 1986 amendment was supported by many of the affected trade groups and collection

[25] *Id.* *Compare* Table No. 816 *with* No. 825.

[26] *Id.* No. 815.

[27] *Compare* No. 818 *with* No. 621.

lawyers because the Act was a compromise tailored to suit their legitimate business needs while directed only at eliminating unethical practices in the industry. This higher plane of competition based on ethical debt collection standards is a fundamental goal specified in the Act itself.[28] It has long been upheld by this Court: "The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *FTC v. Standard Educ. Soc.*, 302 U.S. 112, 116 (1937).[29] The

[28] 15 U.S.C. § 1692(e).

[29] *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 78 (1934) ("The courts must set their faces against a conception of business standards so corrupting in its tendency . . . . The careless and the unscrupulous must rise to the standards of the scrupulous and diligent"). *See also* (continued...)

decision below must be affirmed to insure continuation of this congressional policy of ethical debt collection behavior.

CONCLUSION

For the reasons stated above, the Seventh Circuit's decision should be affirmed.

---

[29](...continued)
Friedman v. Rogers, 440 U.S. 1, 9 (1979) (There is no protection in the first amendment for deceptive commercial speech).

Respectfully submitted,

Robert J. Hobbs
Counsel of Record
Denise A. Lisio
National Consumer Law Center
18 Tremont Street
Boston, MA 02108
(617) 523-8010

Alan Alop
Legal Assistance Foundation of Chicago
343 South Dearborn Street,
Suite 700
Chicago, IL 60604
(312) 347-8310

Joan S. Wise
Deborah M. Zuckerman
American Association of Retired Persons
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-6045

Attorneys for *Amicus Curiae*

January 17, 1995